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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,

Petitioners,

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants; UNITED STATES OF AMERICA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body; INDIANA STATE TEACHERS ASSOCIATION; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners[1] hereby pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

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1. Petitioners are the original defendants in this action, the Board of School Commissioners of the City of Indianapolis, together

(Continued on next page)

the Seventh Circuit entered on July 16, 1976 in the consolidated causes captioned "United States of America, Plaintiff-Appellee, Donny Brurell Buckley, *et al.*, etc., Intervening Plaintiffs-Appellees, vs. Board of School Commissioners of City of Indianapolis, Indiana, *et al.*, Defendants-Appellants", Cause Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965 and 75-2007.

OPINIONS BELOW.

The opinion of the Court of Appeals filed July 16, 1976, and the opinion and judgment of the United States District Court for the Southern District of Indiana filed August 1, 1975, are not yet reported. Copies of such opinions and judgment are set forth in Appendix A.

Prior opinion, order and supplemental opinion of the District Court, reported at 368 F. Supp. 1191 (S. D. Ind. 1973), are reprinted in Appendix A beginning at Page A52 for the reason that such opinions discussed matters relevant to the questions presented by the present petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 16, 1976. None of the parties filed a petition for rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Did the District Court, upon determining that a sufficient legal basis existed for interdistrict relief in a school desegregation case, exceed its statutory jurisdiction or improperly exercise its equitable powers by ordering implementation of a specific remedy

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(Continued from preceding page)

with its elected members and appointed superintendent of schools, in their official capacities ("IPS"). Respondents named in the caption include all other parties in the Court of Appeals.

consisting of transfer of specified numbers of black students from their resident city school district to suburban schools, without giving the school districts and other parties affected thereby an opportunity to present alternative plans, without hearing and determining the feasibility and propriety thereof, without making the findings required by 20 U. S. C. § 1713 and 20 U. S. C. § 1755, and without providing an opportunity for community participation in the development of a voluntary remedial plan as required by 20 U. S. C. § 1758?

2. Is the interdistrict desegregation remedy ordered by the District Court, consisting solely of involuntary transfers of black students from their resident city school district to designated suburban school districts, commensurate with the scope of the interdistrict violation found?

3. Did the District Court improperly exercise its equitable powers, or abuse its discretion, by ordering an interdistrict remedy which (a) requires solely the involuntary transfer of black students to school systems of which their parents are not voting constituents, without any corresponding requirement for transfer of white students and without any conditions to assure that the educational opportunities offered the transferred black students will be thereby improved; (b) financially burdens and discriminates against the city school system by requiring payments under state law to suburban school systems in excess of their increased costs attributable to the transferee students; and (c) necessarily will require closing of a substantial number of city school facilities without proof of their inferiority and dismissal of a substantial number of teachers and staff without requiring employment of any additional staff by the receiving suburban schools?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and certain provisions of the Equal Educational Opportunities Act of 1974, Title II of Public Law 93-380, 20 U. S. C. § 1701, *et seq.*, which provisions are set forth in Appendix D beginning at page A122.

Also significant is Indiana Acts 1974, P. L. 94, codified as Indiana Code 20-8.1-6.5, relating to the transfer of students from one school corporation to another in compliance with a court order to effect a plan of desegregation, which statute is reprinted in Appendix D beginning at page A126.

STATEMENT OF THE CASE.

A. Proceedings Prior to 1975.

The United States commenced this action in 1968 by complaint against petitioners pursuant to Section 407 of the Civil Rights Act of 1964, 42 U. S. C. § 2000c-6. Jurisdiction of the District Court was invoked under that Section and 28 U. S. C. § 1345.

The District Court on August 18, 1971 rendered its decision that IPS was an unconstitutionally segregated school system, 332 F. Supp. 655 (S. D. Ind. 1971), affirmed, 474 F. 2d 81 (7 Cir. 1973), *cert. denied*, 413 U. S. 920 (1973). Upon the direction of the District Court the United States added respondent school corporations as parties defendant but sought no affirmative relief against the added defendants. On September 14, 1971 the District Court granted the petition of respondents Buckley to intervene as plaintiffs on behalf of the class which they sought to represent. In an amended complaint filed October 21, 1971, such intervening plaintiffs named respondents state officials and school corporations, plus other school corporations

no longer parties, as defendants. Such amended complaint asserted jurisdiction under 42 U. S. C. §§ 1983 and 1988, 28 U. S. C. §§ 1343(3), 2201 and 2202, and under the Fourteenth Amendment to the United States Constitution.

In their amended complaint (Appendix C, A115), intervening plaintiffs alleged that defendants by their method of maintaining and operating separate school corporations effected racial segregation and discrimination in the public school systems of Marion County and the Indianapolis metropolitan area, in violation of the Fourteenth Amendment rights of such plaintiffs. They asked the Court to declare unconstitutional certain Indiana statutes relating to the organization and boundaries of separate school districts in Marion County and the organization of local government therein "insofar as they effect racially separate public schools and school systems in Marion County and the Indianapolis metropolitan area", and further prayed for injunctive relief "including if necessary" either consolidation or merger of the defendant school systems, or adoption by such defendants of agreements and arrangements for operation of the schools in the metropolitan area as would "secure to plaintiff-intervenors equal educational opportunities in desegregated and nondiscriminatory schools and school systems." They further requested the Court to order defendants to prepare a plan for the operation of all public schools within the school systems joined as defendants "in conformity with the requirements of the Fourteenth Amendment." (A120.)

Following a trial on such issues, the District Court filed an opinion and judgment on July 20, 1973. 368 F. Supp. 1191 (S. D. Ind. 1973). The Court found (1) a desegregation plan confined to IPS only would not be viable, 368 F. Supp. at 1197-1199 (A57-60); (2) the State of Indiana is legally responsible for the operation of all public schools and consequently for discriminatory actions of local school corporations, and had an affirmative duty to end the conditions so created, 368 F. Supp. at 1199-1203 (A60-68); (3) no evidence was presented

of overt acts of de jure segregation committed by any of the added defendant school corporations within their respective borders, but the Marion County school defendants unanimously opposed the proposed consolidation recommended by a county school reorganization committee, 368 F. Supp. at 1203 (A68-69); and (4) racial discrimination in housing, tolerated or encouraged by the State, in the Indianapolis metropolitan area resulted in segregation in schools as between IPS and surrounding suburban school districts, 368 F. Supp. at 1204-1205 (A70-71). The Court concluded that the Indiana General Assembly had the power and duty to provide a metropolitan school desegregation remedy, in default of which the Court would be required to devise its own plan, 368 F. Supp. at 1205 (A72), and the Court recommended that the area to be included in such a metropolitan plan consist of all Marion County plus a tier of townships continguous to the county, 368 F. Supp. at 1207 (A77). The constitutionality of the Indiana statutes challenged in the amended complaint was expressly not decided, 368 F. Supp. at 1208 (A78).

As "interim relief" the District Court ordered the suburban school corporations in the defined area, with two exceptions, to enroll a number of Negro children from IPS equal to 5% of their total enrollment, effective with the 1973-74 school year. 368 F. Supp. at 1209 (A80). On August 8, 1973 the Court stayed that order for one year. The Court further ordered IPS to institute a plan effective with the 1973-74 school year which would provide for a minimum Negro enrollment of approximately 15% in each IPS elementary school, and to rearrange high school feeder patterns, 368 F. Supp. at 1209 (A80-81). Such a plan for IPS elementary schools was devised with the assistance of court-appointed commissioners and implemented in the 1973-74 school year, and continues in effect today. That portion of the Court's order relating to high schools was deleted to await a final desegregation plan.

In a supplemental opinion filed December 6, 1973, 368 F. Supp. at 1223 (A96) the Court established February 15, 1974 as a "reasonable time" within which the General Assembly could perform its asserted duty to make provision for a metropolitan desegregation plan, 368 F. Supp. at 1224 (A99). The Court suggested and discussed different methods by which the General Assembly could "approach the problem of effectively desegregating IPS", 368 F. Supp at 1227-1228, 1230 (A104-106, 108). In discussing these options the Court strongly suggested that the General Assembly could "discharge its duty in this matter" and thereby satisfy the Court by simply amending the existing state law relating to student transfers to provide for the method of payment and responsibility for transportation and tuition for students transferred from a de jure segregated district to other districts, 368 F. Supp. at 1230-1231 (A110-111). The Court made clear its preference for a "one-way transfer plan," whereby a percentage of IPS black students would be enrolled in suburban school corporations, over the other alternatives discussed. Not surprisingly, the General Assembly responded by enacting in its 1974 session just such a limited transfer statute as the Court suggested. Acts 1974, P. L. 94, I. C. 20-8.1-6.5 (Appendix D, A126-133).

The District Court in its supplemental decision also vacated the interim interdistrict transfer orders previously stayed, suggesting the percentage there provided would no longer be sufficient after the then current school year. The Court concluded that "if the solution is handed back to the Court by default, additional scrutiny will necessarily be given to complete consolidation along metropolitan lines." 368 F. Supp. at 1231 (A111-112). In a separate unpublished order on December 6, 1973, the District Court directed petitioners to "proceed forthwith to prepare a contingent plan or plans for the final desegregation of IPS, one of which shall be prepared on the assumption that certain IPS pupils will be transferred to suburban schools in accordance with the observations set out in Part V of

Indianapolis III. [368 F. Supp. at 1228-1230, A105-109]." IPS did prepare and file with the Court such a plan, as well as alternative plans for desegregation within IPS only. No action was taken by the Court or other parties concerning those plans.

B. The Present Judgment.

Following the decision of this Court in *Milliken* v. *Bradley*, 418 U. S. 717 (1974), the Court of Appeals reversed "the District Court's findings, conclusions, orders and rulings insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries [*i.e.* the boundaries of Marion County]," 503 F. 2d 68, 86 (7 Cir. 1974). The Court remanded the case to the District Court with directions to "determine whether the establishment of the Uni-Gov boundaries without like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken*" (503 F. 2d at 86). This Court denied certiorari. 421 U. S. 929 (1975).

After a further trial on remand, the District Court on August 1, 1975 filed an opinion and entered the judgment which is the subject of the present petition (A114). The Court found that the establishment of Uni-Gov without a like reestablishment of IPS boundaries, together with other legislation affecting school district boundaries in Marion County, "warrants a limited interdistrict remedy within all of Marion County, Indiana as hereafter described." (A41.) The Court also found that actions of the respondent Housing Authority of the City of Indianapolis in locating and constructing public housing projects solely within IPS boundaries had contributed to interdistrict school segregation (A39). Consistent with his previously expressed preference for a "one-way" transfer of IPS black students to suburban schools, the district judge then entered a series of specific judgments directing IPS to transfer to each of the Marion County school corporations outside IPS, with the exception of Washington and Pike Townships which already were approaching a black student enrollment of 15% within

their own boundaries, specified numbers of IPS black students in grades 1 through 9 for the 1975-76 school year, with corresponding numbers of transfers of first grade students in subsequent years until all 12 grades were included, and directing the respondent districts to accept and enroll such students in their schools (A47-50). The number of students ordered transferred was computed on the basis of enrollment statistics for the 1974-75 school year "in such number as to cause the total enrollment of pupils in such [transferee] school corporation, after the transfers have been accomplished, to be approximately 15% black" (A44). These judgments were stayed pending appeal.

In a separate judgment the District Court "ordered and adjudged that IPS prepare and file with the Court, on or before October 15, 1975, a plan, or alternative plans, for the final desegregation of its schools, taking into account the transfer of pupils ordered herein" (A50). That judgment was not appealed, but on October 2, 1975, the District Judge entered a stay thereof until further notice, which stay remains in effect.

The District Court's judgment was entered simultaneously with his ruling that the facts warranted an interdistrict remedy within Marion County under the legal standards of *Milliken* v. *Bradley, supra.* The Court did not give IPS, any other affected school corporation, or plaintiffs an opportunity to prepare and submit to the Court for consideration any alternative interdistrict desegregation plans which might satisfy the requirements of the Fourteenth Amendment to desegregate IPS schools, including but not limited to methods suggested in the Court's previous opinions. Moreover, the Court did not attempt to make any findings concerning the feasibility of alternative methods of desegregation as required by 20 U. S. C. § 1713, or to provide a reasonable opportunity for development of a voluntary remedial plan, after notice of the violation, as required by 20 U. S. C. § 1758.

On July 16, 1976, the Court of Appeals affirmed in all respects the judgments of the District Court. With respect to the propriety of the specific remedy ordered by the District Court, the Court of Appeals said only:

> "The limited interdistrict remedy ordered by the District Court is supported by the record and in accord with legal principles enunciated in *Milliken*" (A26).

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals by approving the remedy decreed by District Court without giving the parties an opportunity to develop and propose alternative plans, as required by the Equal Educational Opportunities Act of 1974, has decided an important question of federal law not settled by this Court and has sanctioned a substantial departure from the usual course of judicial proceedings in school desegregation cases.

A. The Equal Educational Opportunities Act.

The Equal Educational Opportunities Act of 1974, Title II of P. L. 93-380, codified as 20 U. S. C. §§ 1701-1758, became effective October 20, 1974, P. L. 93-380, § 2(c), and presumptively applies at least to all federal court desegregation orders entered after that date.[2] The statute provides that in formulating a remedy for denial of equal protection of the laws which may involve transportation of students, a federal court shall consider and make specific findings on the efficacy of certain specified kinds of remedies set forth in an order of priority, require implementation of the first of the remedies which would meet constitutional requirements, 20 U. S. C. § 1713, and impose only such remedies as are essential to

2. The validity of the retroactivity of the application of § 256, 20 U. S. C. § 1755, to orders entered after June 30, 1974, need not be considered here since the District Court's order was entered August 1, 1975.

correct particular denials of equal protection, 20 U. S. C. § 1712. The statute further permits approval of a plan voluntarily proposed which varies from the standards set forth in the statute, 20 U. S. C. § 1716. Part B further provides that a federal court shall not order as a remedy for de jure segregation the implementation of any plan involving transportation of students unless all alternative remedies are first found to be inadequate, 20 U. S. C. § 1755. The act states that no such order shall be entered until the local school district affected thereby has been given notice of the details of the violation and a reasonable opportunity to develop a voluntary remedial plan with sufficient time for community participation therein. 20 U. S. C. § 1758.

The interpretation and application of this statute to court-ordered plans for desegregation of school systems where constitutional rights have been found violated, and the application to the statutory limitations of 20 U. S. C. § 1702(b) which states that "the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the Fifth and Fourteenth Amendments to the Constitution of the United States," have never been considered or decided by this Court. The statute deals with important questions of public policy having major national significance and affecting large numbers of students and parents across the country, as federal courts increasingly are finding the existence of unconstitutional segregation in the schools of many large urban areas and school systems. Only a few lower federal courts have had occasion to consider any provision of the statute. While certain provisions thereof, particularly § 214, 20 U. S. C. § 1714(a), which purports to prohibit requiring transportation of a student to a school other than the school closest or next closest to place of residence, may well be subject to overriding constitutional requirements, as the Sixth Circuit held in *Brinkman* v. *Gilligan*, 518 F. 2d 853, 856 (6 Cir. 1975), it does not necessarily follow that all other proce-

dural requirements are likewise inapplicable, particularly in view of the broad separability clause, 20 U. S. C. § 1721. Those few courts which have considered the statute have assumed that the findings required by 20 U. S. C. § 1713 should be made in the case of any order entered after the effective date of the act, *Keyes* v. *School District No. 1, Denver, Colorado,* 521 F. 2d 465, 477 n. 9 (10 Cir. 1975), or have specifically considered the alternative possible remedies and made the findings contemplated by that section and by § 1755, *Morgan* v. *Kerrigan,* 401 F. Supp. 216, 263-264 (D. Mass. 1975), *affirmed,* 530 F. 2d 401, 412-413 (1 Cir. 1976).

It does not appear that the requirement of 20 U. S. C. § 1758 that a local school board be given the opportunity to develop voluntary plans prior to any Court remedial order, has been considered in any reported decision. In the present case, while it is true that IPS had notice of the nature of the violations within its own district by the District Court's decision of August 18, 1971, the parties were not notified of the details of the interdistrict violation which the Court determined warranted an interdistrict desegregation remedy until the District Court issued its order on August 1, 1975. Yet the Court, in proceeding to order its specific interdistrict remedy, not only ignored the possible application of this statutory requirement but failed to give any consideration to the possible use of alternative remedies which Congress directed should be considered.

B. The Procedure Followed by the District Court in Ordering the Interdistrict Remedy.

Immediately upon finding the existence of an interdistrict violation within the standards of *Milliken* v. *Bradley,* 418 U. S. 717 (1974), the Court entered judgment ordering implementation of a specific interdistrict plan formulated solely by the Court and not suggested by any party. The District Court thus "departed from the accepted and usual course of judicial proceedings", Rule 19(1)(b), universally followed

by other courts which have had occasion to consider the question of interdistrict desegregation remedies, as well as the procedure followed by courts faced with the necessity to order a remedy for de jure segregation within large urban school systems. Since the Court of Appeals in approving the remedy sanctioned such a departure by the District Court, this Court should exercise its supervisory power to determine the propriety of the procedure followed in this case, and the procedure which should be followed by other courts dealing with similar problems, regardless of the applicability of the statutory requirements referred to above. Moreover, the District Court ordered a remedy which finds no precedent in any other reported decision in which an interdistrict desegregation remedy was ordered or considered.

Other courts have ordered implementation of an interdistrict remedy only after receiving plans from all affected parties and interested community groups, holding hearings on such proposals, obtaining the views of experts and weighing the advantages and disadvantages of the various alternatives.[3] Before ordering implementation of desegregation plans within a single large urban school district the federal courts have likewise uni-

3. See, *e.g. Evans* v. *Buchanan*, 393 F. Supp. 428, 446-447 (D. Del. 1975), affirmed, ... U. S. ....., 96 S. Ct. 381, 46 L. Ed. 2d 293 (1975), opinion on remedy, 416 F. Supp. 328, 334-335 (D. Del. 1976) (ordering consolidation and reorganization of districts); *Bradley* v. *Milliken*, 345 F. Supp. 914, 916-917, 920-922, 938 (E. D. Mich. 1972), affirmed and vacated in part, 484 F. 2d 215 (6 Cir. 1973), reversed, *Milliken* v. *Bradley*, 418 U. S. 717 (1974) (afer hearing on interdistrict plans submitted the Court appointed a panel to develop further plans, with subsequent opportunity for presentation of objections and hearings thereon); *Bradley* v. School *Board of City of Richmond, Virginia*, 338 F. Supp. 67, 78, 246 (E. D. Va. 1972), reversed, 462 F. 2d 1058 (4 Cir. 1972), affirmed by equally divided Court, 412 U. S. 92 (1973) (school board interdistrict plans considered and approved; additional planning ordered). See also *Newburg Area Council, Inc.* v. *Board of Education, Jefferson County, Kentucky*, 489 F. 2d 925, 932 (6 Cir. 1973), vacated, 418 U. S. 918 (1974), reaffirmed, 510 F. 2d 1358 (6 Cir. 1974); *Hoots* v. *Commonwealth of Pennslvania*, 359 F. Supp. 807, 824-825 (W. D. Pa. 1973), appeal dismissed, 495 F. 2d 1095 (3 Cir. 1974).

formly followed a similar procedure.[4] Even in cases where extensive litigation and numerous appeals concerning the appropriate remedy to be adopted had occurred extending over a period of several years, the courts have required full consideration of alternative plans and objections thereto before entering a final decree.[5]

In the present case neither IPS, any of the added defendant school corporations, state officials, the plaintiffs, nor any interested group or organization has ever had an opportunity to propose remedial plans for desegregation of IPS schools within Marion County, present to the Court pertinent facts relating to possible alternatives, or have the Court determine the best alternative after weighing the evidence and the advantages and disadvantages of each. When the Court issued its decision finding a legal basis for an interdistrict remedy, it simultaneously fashioned and decreed the specific remedial plan. The Court never requested or considered plans or proposals from any of the parties to the case, including the affected school districts,

4. See, *e.g.*, *Morgan* v. *Kerrigan*, 401 F. Supp. 216, 224-227 (D. Mass. 1975), affirmed, 530 F. 2d 401 (1 Cir. 1976) (Boston); *Keyes* v. *School District No. 1, Denver Colorado*, 380 F. Supp. 673, 675 (D. Colo. 1974), affirmed in part and reversed in part, 521 F. 2d 465 (10 Cir. 1975); *Dowell* v. *Board of Education of Oklahoma City Public Schools*, 338 F. Supp. 1256, 1259 (W. D. Okla. 1972), affirmed, 465 F. 2d 1012 (10 Cir. 1972); *Booker* v. *Special School District No. 1, Minneapolis, Minn.*, 351 F. Supp. 799, 810 (D. Minn. 1972) (school board plan approved with modifications); *United States* v. *School District of Omaha*, 521 F. 2d 530, 546-548 (8 Cir. 1975) (board directed to submit plan under court guidelines); *Amos* v. *Board of Directors of City of Milwaukee*, 408 F. Supp. 765, 823 (E. D. Wis. 1976) (special master appointed to conduct hearings and recommend plan); *Arthur* v. *Nyquist*, 415 F. Supp. 904, 970 (W. D. N. Y. 1976) (Buffalo).

5. *Bradley* v. *Milliken*, 402 F. Supp. 1096, 1103-1104 (E. D. Mich. 1975) (Detroit) (experts appointed to assist Court); *Calhoun* v. *Cook*, 487 F. 2d 680, 684 (5 Cir. 1973), remanding for further hearings plan adopted by District Court at 362 F. Supp. 1249 (N. D. Ga. 1973) (Atlanta); *Tasby* v. *Estes*, 412 F. Supp. 1192, 1194 (N. D. Tex. 1976), after remand per 517 F. 2d 92 (5 Cir. 1975) (Dallas); *Northcross* v. *Board of Education of Memphis City Schools*, 489 F. 2d 15, 16 (6 Cir. 1973).

never received or considered an amicus plan tendered in 1973, which the Court then had found "premature," 368 F. Supp. at 1197 (A56), and never heard the concerns or proposals of interested community organizations and parents who sought but were denied leave to intervene. It is apparent that the Court formulated its own plan at an early stage of the case, ordered the parties to implement that plan when the General Assembly had taken no contrary affirmative action, and was not receptive to any suggestions of alternative approaches to the problem of formulating an interdistrict remedy. 368 F. Supp. 1191, 1228-1231 (S. D. Ind. 1973) (A105-111). Compare the Court's prior order for interim interdistrict transfers, 368 F. Supp. at 1209 (A80).

The summary procedure adopted by the Court with respect to the remedy wholly precluded consideration of the viability or adaptability to the Indianapolis situation of desegregation techniques which have been proposed and reviewed by courts in other school systems, both in interdistrict and single-district contexts, including techniques which Congress in 20 U. S. C. § 1713 mandated district courts to consider. In addition to the possibilities alluded to by the Court in his December, 1973 opinion, 368 F. Supp. at 1227-1228 (A104-105), and solely by way of illustration, remedial techniques which could have been considered as part of an interdistrict remedy include reorganization or revision of school district boundaries in a manner which would change the existing racial composition of the school populations within IPS and the separate suburban districts, establishment of "magnet schools" or "optional schools" having specialized or alternative educational programs which could attract on a voluntary basis both black and white students from IPS and other school districts,[6] pairing or clustering of selected

6. Decisions holding some form of the "magnet schools" concept acceptable as a major component of a desegregation plan in an urban area include *Hart* v. *Community School Board of Education, New York School District No. 21*, 512 F. 2d 37, 52-53 (2 Cir. 1975) and *Tasby* v. *Estes*, 412 F. Supp. 1192, 1205 (N. D. Tex. 1976).

schools on an interdistrict basis with possible revision of grade structures and utilizing contiguous areas, establishment of "desegregation centers" where certain portions of the educational program could be operated jointly by more than one school district, or an interdistrict majority to minority transfer plan which could be elected on a voluntary basis by parents and students.[7]

Petitioners desire to minimize the necessity for involuntary reassignments of students for desegregation purposes, with the financial and other burdens inherent in plans focusing primarily on extensive transportation in a large urban area. See *Keyes* v. *School District No. 1*, 413 U. S. 189, 241-242, 248-251 (1973) (Powell, J., concurring in part). Of course, the enforcement of constitutional rights cannot be suspended or diluted because of popular disagreement with the methods necessary to effectuate such rights. *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955) (*Brown II*); *Monroe* v. *Board of Commissioners*, 391 U. S. 450, 459 (1968). But the procedure followed here by the District Court, and approved

7. The Court of Appeals, in rejecting the "voluntary transfer" proposal of the United States as a limited interdistrict remedy, focused solely on the procedures of the Indiana transfer statute giving discretion to the school corporations. I. C. 20-8.1-6.1 (A25). But it is well established that a federal court in ordering affirmative action to eliminate de jure segregation is not limited to or bound by the procedures specified by state law, even though facially neutral. *United States* v. *Scotland Neck City Board of Education*, 407 U. S. 484, 487-489 (1972); *Milliken* v. *Bradley*, *supra*, 418 U. S. at 744; Cf. *North Carolina Board of Education* v. *Swann*, 402 U. S. 43, 45 (1971). As this Court stated in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 26-27, a majority to minority optional transfer plan, at the election of the student and with transportation and space provided, certainly should be considered as a plan component, even if insufficient to fully accomplish the degree of desegregation required. See also the suggestion of a limited form of interdistrict remedy in Strickman, *School Desegregation at the Crossroads*, 70 Nw. U. L. Rev. 725, 760-767 (Nov.-Dec. 1975).

While "freedom of choice" which does not desegregate may be unacceptable, it is not *per se* impermissible as a desegregation tool in an appropriate case. *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 440-441 (1968).

by the Court of Appeals, bypassed consideration of "the use of all available techniques" which could "achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners of Mobile County*, 402 U. S. 33, 37 (1971). The procedure also bypassed the primary responsibility of the school authorities to devise and implement an affirmative plan to eliminate unlawful segregation in their schools, with judicial authority entering only when local authority defaults. *Brown II*, 349 U. S. at 299; *Swann*, 402 U. S. at 15-16; *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971).

II. The interdistrict remedy ordered does not conform to the scope of the violation found.

The principal legal basis upon which the District Court relied in entering its interdistrict decree was stated as follows (A41):

> "The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited interdistrict remedy within all of Marion County, Indiana, as hereafter described."

In affirming the judgment the Court of Appeals concluded (A19):

> "It is clear to us that Uni-Gov and its companion 1969 legislation were '[A] substantial cause of interdistrict segregation,' *Milliken* v. *Bradley*, 418 U.S. 717, 745 (1974), and '[C]ontributed to the separation of the races by . . . redrawing school district lines . . .' *Id.* at 755 (Stewart, J., concurring)."

The Court of Appeals further elaborated on this point by stating (A20):

> "In this case we are dealing with a situation in which but for certain events chargeable to the state, Marion

> County would be either a consolidated school district under the 1959 School Reorganization Act or IPS would have been expanded with the civil city of Indianapolis under Uni-Gov."

In *Milliken* v. *Bradley, supra,* this Court expressed the controlling remedial standards:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U.S., at 16." 418 U. S. at 744.
>
> ". . . The remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." 418 U. S. at 746.

If the lower courts correctly determined the nature of the interdistrict violation in this case, it would seem to follow that the remedy most nearly corresponding to the scope of the violation would be a remedy under which students could attend schools across district lines in either direction, without regard to the existing school district boundary lines in Marion County effectively frozen by Uni-Gov and its companion legislation described by the Court, and which would not be limited to transfers of IPS black students into surrounding districts.

In its 1975 decision the District Court gave no rationale for its determination that the limited one-way transfers ordered constituted the only appropriate remedy for the violation found, thus precluding consideration of other possible remedies such as voluntary or involuntary transfers of white suburban students to IPS, pairing and clustering of schools, or reorganization of district boundaries. The Court merely stated its conclusion (A44):

> "The Court finds that the Fourteenth Amendment compels it to order IPS to transfer, and for the added defendant school corporations, other than Pike and Washington, to receive approximately [9,525] black students, over a period of time, in order to effect a plan of desegregation

> within IPS which is acceptable within the meaning of such amendment."

In his prior July, 1973 opinion, under the heading "Interim Relief", the District Judge said, 368 F. Supp. at 1208 (A78):

> "The Court is of the opinion that it would be without jurisdiction to order the exchange of pupils between IPS and added defendants at this time. It is Negro children of IPS and not suburban children who are being deprived of a constitutional right, and so long as the various school corporations remain separate the Court believes that it would have no basis to direct that a suburban child be transported out of its own school corporation."

No authority was cited for the stated proposition. Nor is it apparent, in the absence of a finding of segregative actions by a school district in the operation of its own system, why such a school district could be compelled to accept and accommodate students transferred to it from another system but could not be required to exchange students or operate a combined educational program with such other system.

Other district courts have not felt constrained by such a limitation, assuming that a sufficient legal basis existed for ordering an interdistrict remedy.[8] The failure of the lower courts in the present case to analyze and apply a remedy for the interdistrict violation corresponding to the scope of the violation found has resulted in a decision in conflict with the applicable decision

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8. *Bradley* v. *Milliken*, 345 F. Supp. 914, 919 (E. D. Mich. 1972), affirmed in part, 484 F. 2d 215 (6 Cir. 1973), reversed on other grounds, 418 U. S. 717 (1974) ("Transporation and pupil assignment shall, to the extent consistent with maximum feasible desegregation, be a two-way process with both black and white pupils sharing the responsibility for transportation requirements at all grade levels."); *Evans* v. *Buchanan*, 416 F. Supp. 328, 350 (D. Del. 1976) ("Where one of the violations was the isolation of Wilmington from the possibility of union with other districts, *prima facie* an appropriate remedy would be ordering of the union to take place. We have determined that the violations found in the instant case present a situation where some sort of consolidation or reorganization is required.")

of this Court defining the appropriate standard in such a case, *Milliken* v. *Bradley, supra,* as well as with the kinds of remedies considered by federal courts in other reported decisions dealing with a similar problem. The Court should grant certiorari to further clarify its *Milliken* guidelines in such a situation.

III. The interdistrict remedy devised by the District Court and approved by the Court of Appeals, placing the entire burden and cost of desegregation upon black students and their resident school district, has decided an important question of federal law relating to the limits of a court's discretion in fashioning and effectuating a decree in a school desegregation case, which has not been but should be decided by this Court.

The general duty of district courts, where school authorities fail to provide an adequate constitutional remedy, was outlined by this Court in *Brown* v. *Board of Education,* 349 U. S. 294, 299 (1955) (*Brown II*). More recently in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), this Court was called upon to specify in more detail guidelines for the assistance of school authorities and "for the exercise of the district judge's discretion and for the reviewing function of the court of appeals," stating that "the task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." 402 U. S. at 15-16. However, *Swann* and other cases in this Court concerning administration of the remedy, were "confined to violations and remedies within a single school district," *Milliken* v. *Bradley,* 418 U. S. at 744. Even in the context of the single district, this Court has not been called upon to establish guidelines for the exercise of a federal court's equity powers in relation to the proper allocation of the burdens and costs of desegregation as between black and white students, parents and taxpayers. In *Milliken* the Court established the standards and limitations under which any kind of interdistrict remedy could be required,

but did not reach any question relating to the appropriate nature, scope and characteristics of such a remedy. That question is presented here.

The remedy devised and ordered by the District Court, solely on its own initiative, has the following principal characteristics:

1. Approximately 9,500 black students residing in IPS would be assigned to attend school, for the entire period of their public education in grades one through twelve, among eight separate, independently governed school corporations, with transportation provided at the expense of IPS. No interdistrict transfers of white students would be made.

2. Under the provisions of the state statute enacted while this case was pending and incorporated into the judge's decree, I. C. 20-8.1-6.5 (Appendix D, A126), IPS is required to pay, in addition to the capital and operational costs of transportation, tuition to each receiving school corporation based on that corporation's current per capita operational and capital budgets multiplied by the number of students transferred. The State of Indiana currently pays approximately 38% of the IPS operational budget. While the costs of such transfers cannot be precisely calculated at this time, IPS estimates a net annual cost to it, after deduction of the state-funded portion of the cost, approximating 7.5 million dollars after the program is fully operational. This calculation assumes cost savings resulting from reduction in IPS teaching staff at the ratio of one teacher for each 30 students transferred and the closing of approximately 15 IPS school facilities.[9] Since the required tuition payments are

9. Under Indiana law local tax levies for the support of school corporations are frozen at the dollar amount levied in 1972 for taxes collectible in 1973, I. C. 6-1.1-19, and school corporations are wholly dependent on annual increases in direct state assistance and appropriations therefor, controlled by the legislature, to meet increased operational costs, unless the state board of tax commissioners approves an "excessive tax levy" resulting in the state taking control of the school corporation's financial operations, I. C.

(Continued on next page)

not based upon incremental costs of serving additional students, and if, as the District Judge assumed, the suburban districts presently have "ample space available in which to house the transferees" (A45), the transfer of funds from IPS and its taxpayers could well result in substantial cost savings to the other districts.

3. Since the decree makes no provision for the employment of additional teachers or staff by the receiving school districts, or the transfer of any surplus IPS teachers to those districts, and since most transferee districts have indicated that the students could be absorbed into existing classrooms, the inevitable consequence would be a reduction in the total number of teachers serving the present school populations of IPS and the other affected districts. Further, the decree makes no provision for enrichment or compensatory programs which could improve educational opportunities for the transferred black students.

4. The decree would necessitate closing a substantial number of IPS school facilities, presently attended by black students, without any proof of the physical or educational inferiority of such facilities.

The federal courts in a number of cases have had occasion to consider arguments that particular school desegregation plans imposed an unfair or inequitable burden of transportation or other readjustments upon black students and their parents, but their pronouncements on the subject have been far from consistent. For example, in *Cisneros* v. *Corpus Christi Independent School District*, 467 F. 2d 142, 153 (5 Cir. 1972) the Court said:

> "In fashioning transportation plans the school board and District Court must avoid invidious discrimination

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6-1.1-19-4. Possible exceptions under the statute relating to court-ordered transfers cover only net transportation costs, I. C. 20-8.1-6.5-9, and additional operation costs in the first year of the program where the budget has previously been esablished, I. C. 20-8.1-6.5-4(b), and such exceptions are subject to the approval of the state tax board under I. C. 6-1.1-17.

> on the basis of race or national origin through the imposition of the burden of desegregation on one or both of the minority groups. Lee v. Macon County Board of Education [5th Cir. 1971], 448 F.2d at 753-754; Mims v. Duval County School Board, 5 Cir. 1971, 447 F.2d 1330, 1331-1332."[10]

Federal courts have, on the other hand, approved plans which involved transportation of substantially more black students than white, or greater travel distances, where justified by the facts of the particular situations.[11] The difference of views expressed by the courts on this subject has not gone unnoticed. See *Kelly* v. *Guinn*, 465 F. 2d 100, 111 (9 Cir. 1972). Most of these cases have been decided subsequent to this Court's decision in *McDaniel* v. *Barresi*, 402 U. S. 39 (1971), approving remedial steps which "will almost invariably require that students be assigned 'differently because of their race,'" 402 U. S. at 41, but which did not consider any issue of disproportionate burdens.

Petitioners do not here suggest a "constitutional absolute", 368 F. Supp. at 1228 (A107), requiring "exact mathematical

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10. See also *Kelley* v. *Metropolitan City Board of Education of Nashville, Tenn.*, 463 F. 2d 732, 751-752 (6 Cir. 1972) (concurring opinion of Judge McCree); *Brice* v. *Landis*, 314 F. Supp. 974, 977-979 (N. D. Calif. 1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 328 F. Supp. 1346, 1350-1352 (W. D. N. C. 1971) and subsequent opinion at 362 F. Supp. 1223, 1232-1234 (W. D. N. C. 1973); *Arvizu* v. *Waco Independent School District*, 495 F. 2d 499, 508 (5 Cir. 1974); *United States* v. *School District of Omaha*, 521 F. 2d 530, 546 (8 Cir. 1975) ("the burdens of integration shall be borne as equally as possible by blacks and whites in all geographic areas of the District.")

11. See *e.g.*, in addition to cases cited by the District Judge at 368 F. Supp. 1191, 1228 (A106), *Moss* v. *Stamford Board of Education*, 356 F. Supp. 675 (D. Conn. 1973); *Keyes* v. *School District No. 1, Denver, Colorado*, 521 F. 2d 465, 479 (10 Cir. 1975); *Thompson* v. *School Board of Newport News, Va.*, 465 F. 2d 83, 85 (4 Cir. 1972) and opinion after remand in 498 F. 2d 195, 197 (4 Cir. 1974); *Id.* at 199 (Butzner, J. dissenting); *Higgins* v. *Board of Education of City of Grand Rapids*, 508 F. 2d 779, 793-795 (6 Cir. 1974) (more latitude allowable in school district's voluntary desegregation plan).

equality" in the "burden" of desegregation, *Hart* v. *Community School Board, N. Y. School District No. 21*, 512 F. 2d 37, 53 (2 Cir. 1975). But none of the cases in which plans were approved over such objections involved, as does this case, a plan consisting solely of transfers of black students without any transfers of whites, nor did any of such cases involve the further complexities presented by an interdistrict remedy.

The District Court here justified its conclusion in part by citing pupil density data for selected schools based on pre-1971 enrollment figures and acreage, which in many instances have substantially changed, resulting in reduced density, and by inferring a conclusion that IPS physical plants are generally "antique" and inferior by comparison with those maintained by the suburban corporations. 368 F. Supp. at 1229-1230 (A107-108, 110). The probable inaccuracy of such assumption is illustrated by the facts that since 1960 IPS has spent over $115 million for construction of new schools and major additions or remodeling (excluding site acquisition costs),[12] all approved by state school authorities under the regulations cited by the Court, 368 F. Supp. at 1229 (A107), plus an additional $11 million for modernization of facilities (other than routine maintenance) not classified as "major" construction. These facts merely highlight the inadequacy of the District Court's factfinding procedure in entering its remedial decree, and the importance of a "perceptive and incisive assessment of the delicate factual circumstances involved," *Amos* v. *Board of Directors of City of Milwaukee*, 408 F. Supp. 765, 823 (E. D. Wis. 1976).[13]

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12. These projects include 61 elementary schools and all 11 high schools. Modernization projects include 34 additional elementary schools of which 22 had "major" construction or remodeling in the 1950's. The remaining 6 elementary schools still in use were constructed in the 1950's.

13. As a further example, the District Court assumed that "a 'one-way' suburban busing plan . . . would involve transportation of subsantially fewer pupils, and therefore be less expensive" as

(Continued on next page)

Moreover, the foregoing cases all involved plans which were implemented, or submitted to the Court for approval, upon the initiative of the local school board. More stringent requirements of equity and fairness in allocating the burdens and benefits of a desegregation plan may be applicable where a federal court decrees a plan of its own devising, without any input from the school districts involved, as in the case of the use of multi-member districts in state legislative apportionment plans. See *Chapman* v. *Meier*, 420 U. S. 1, 17-19 (1975).

(Continued from preceding page)

compared to a plan providing for exchange of students. 368 F. Supp. at 1229 (A108). This fails to take into account that portion of the judgment entered in this case which requires IPS to file a plan for "final desegregation of its schools" (A50), which judgment has become final although stayed. As the Court of Appeals said in the prior appeal, "obviously many steps have been taken to dismantle the IPS dual school system within its boundaries, but more steps must be taken." 503 F. 2d 68, 80. If the interdistrict and intradistrict parts of the plan are considered as a whole, and particularly if the reassigned black students are taken from those parts of IPS having greatest proximity to the suburban districts rather than solely from the central city schools identified in the Court's prior opinion as still segregated, 368 F. Supp. at 1228, 1232 (A113), the result may well be transportation of a substantially larger number of pupils.

Although a "two-way transfer plan involving some reassignment of suburban white students to IPS would alleviate some of the financial and other burdens placed on IPS by the present decree, petitioners do not advocate such a solution. While some of the problems identified by this Court in connection with a consolidation plan, *Milliken* v. *Bradley*, 418 U. S. at 743, would not exist, such a plan, as does the District Court's plan, "would make it much more difficult for individual parents to require accountability from teachers and administrators who are employed by districts other than that of their voting residence", *Evans* v. *Buchanan*, 416 F. Supp. at 348, and would have many other disadvantages. Petitioners would ask the District Court first to explore and determine the feasibility and constitutional sufficiency of all other possible options and techniques.

CONCLUSION.

Petitioners recognize that the questions which they here urge the Court to consider were not squarely presented or argued by IPS in the Court of Appeals.[14] However, issues concerning the nature and scope of the interdistrict remedy ordered and its disparate burden on black children, as well as the possible application of the Equal Educational Opportunities Act of 1974, were raised in the brief of the United States filed in that Court, although not discussed in the Court's opinion. Since this case originates in a federal court, there is no absolute requirement that the questions presented have been specifically argued and passed upon in the lower courts. Those courts were fully aware of the existence of these issues in the present case. In view of the unusual circumstances involving a change in the composition of an elected public body, the importance of the questions in the ongoing process of formulating desegregation decrees throughout the nation, the proliferation in recent years of such cases involving large urban school districts, and the substantial number of persons and the public interest, both locally and nationally, which would be affected by the outcome of this case, petitioners submit that the Court should grant certiorari to consider the questions presented.

Respectfully submitted,

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14. On May 4, 1976, after this case was briefed and argued in the Court of Appeals, new board members were elected, four of whom (constituting a majority of the board) took office July 1, 1976. The new board majority favors some kind of interdistrict remedy involving IPS and other Marion County systems but opposes the particular remedy decreed by the District Court, for the reasons suggested herein. Accordingly, the arguments for reversal which IPS presented to the Court of Appeals are not pursued in this Court.

76-520

Supreme Court
FILE
OCT 14 1976
MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,

Petitioners,

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants; UNITED STATES OF AMERICA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body; INDIANA STATE TEACHERS ASSOCIATION; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners,

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants; UNITED STATES OF AMERICA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body; INDIANA STATE TEACHERS ASSOCIATION; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Respondents.

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APPENDIX A.

OPINIONS BELOW.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965, and 75-2007

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, by their parent and next friend RUBY L. BUCKLEY, on behalf of themselves and all Negro school age children residing in the area served by the original defendants herein,
Intervening Plaintiffs-Appellees,

vs.

BOARD OF SCHOOL COMMISSIONERS OF CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP-68-C-225

S. HUGH DILLIN, *Judge.*

Argued December 3, 1975—Decided July 16, 1976

Before FAIRCHILD, *Chief Judge,* SWYGERT and TONE, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This is the third review of successive desegregation orders in a suit brought in 1968 by the United States against the Board of School Commissioners of the City of Indianapolis. The issue before us, as in *Milliken* v. *Bradley,* 418 U. S. 717 (1974), concerns the appropriate exercise of federal equity jurisdiction. The district court found two violations of the Equal Protection Clause upon which it based the interdistrict remedies that are at issue on this appeal. The first was the failure of the state to extend the boundaries of the Indianapolis Public School District (IPS) when the municipal government of Indianapolis and other governmental units in Marion County, Indiana, were replaced by a consolidated county-wide government called Uni-Gov. The second violation was the confinement of all public housing projects (in which 98 percent of the residents are black) to areas within the boundaries of the City of Indianapolis.

On the basis of these violations the district court determined that a limited interdistrict remedy would be appropriate. The court ordered a transfer of black IPS students in grades 1-9 to suburban school districts (except two) within Marion County in such number as to cause the total enrollment of pupils in the suburban schools to be 15 percent black after the transfer. The district court also enjoined the Housing Authority of the City of Indianapolis from constructing any future public housing projects inside the boundaries of IPS and from renovating a housing project known as Lockefield Gardens for other than elderly persons.

On the basis of the entire record and the findings of the district court, we affirm.

I.

The History of the Case

The history of this litigation was described in our most recent opinion, *United States* v. *Board of School Commissioners of*

City of Indianapolis, Indiana, 503 F. 2d 68, 71-75 (7th Cir. 1974), *cert. denied,* 421 U. S. 929; nonetheless, a brief summary is appropriate.

There have been four phases in this suit. In *Indianapolis I* the sole issue was racial segregation within the schools in the Indianapolis Public School District. Judge Dillin, after noting Indiana's official policy of school segregation until 1949, reviewed the conduct of IPS since that year and found the school district guilty of *de jure* segregation. *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 332 F. Supp. 655 (S. D. Ind. 1971).

The court then ordered the United States to add as defendants other school districts in the metropolitan area in order to provide the proper setting for consideration of the appropriateness of a metropolitan remedy. The Government complied with the order. The Buckley plaintiffs, representing a class of black school children, were granted permission to intervene. They joined as defendants several state officials and additional school districts.

On appeal this court affirmed, finding that there was a clear pattern of purposeful discrimination in the gerrymandering of school attendance zones, in the segregation of faculty, in the use of optional attendance zones among the schools, and in school construction and placement—a "[P]attern of decision making which . . . reflected a successful plan for *de jure* segregation." *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 474 F. 2d 81, 84-88 (7th Cir. 1973), *cert. denied,* 413 U. S. 920.

After remand from this court, the district court in *Indianapolis II* took up the problem of fashioning a remedy. One of the issues at trial was the constitutionality of the Uni-Gov Act. The court ordered a remedy without reaching this question. The court found that a meaningful permanent desegregation plan could not be accomplished within the boundaries of IPS, based upon evidence that when the percentage of blacks in a given school

approaches 25 to 30 percent white flight accelerates, resulting in resegregation. *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 368 F. Supp. 1191 (S. D. Ind. 1973). The court further found that the State of Indiana, its officials, and agencies by various acts and omissions promoted segregation and inhibited desegregation within IPS, so that the state which was ultimately charged under the Indiana law with the operation of its public schools had a continuing affirmative duty to desegregate the Indianapolis school system.

The court then ordered a broad interdistrict remedy which encompassed the entire metropolitan area including school districts outside of Marion County. The court held it was the duty of the state, through its General Assembly, to devise its own plan of desegregation, with the understanding that if it failed to do so within a reasonable time the court would have the authority and duty to formulate its own plan. As interim relief, the court ordered IPS to effect pupil reassignment for the 1973-1974 school year sufficient to bring the number of black pupils in each of its elementary schools to approximately 15 percent.

In response to the court's order for the interim relief, IPS submitted a desegregation plan. The court rejected it as inadequate and appointed a two-member commission to develop a plan. This plan was approved by the court and has been implemented. The district court also ordered IPS to transfer to certain defendant school districts a number of black pupils equal to 5 percent of the 1972-1973 enrollment of each transferee school (with certain exceptions). (This portion of the order was stayed incident to subsequent proceedings.) *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 368 F. Supp. 1223 (S. D. Ind. 1973).

In *Indianapolis III* the court issued a supplementary opinion in which Judge Dillin proffered recommendations to the State of Indiana for implementing a desegregation plan. In response, the General Assembly adopted a bill that provides for the adjust-

ment of tuition among the transferor and the transferee districts and for the reimbursement of transportation costs by the state whenever a federal or state court makes certain findings.[1]

On appeal from *Indianapolis II and Indianapolis III* this court, besides affirming the commission's interim IPS plan, affirmed the district court's holding that the State of Indiana, as the ultimate body charged with responsibility of operating its public schools, "[H]as an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries . . . ." *United States* v. *Board of School Commissioners,* 503 F. 2d 68, 80 (7th Cir. 1974), *cert. denied,* 421 U. S. 929. This court, however, in accordance with *Milliken* v. *Bradley,* 418 U. S. 717 (1974), reversed the district court's order pertaining to the interdistrict remedy as to those school districts outside of Uni-Gov (Marion County). That portion of the order pertaining to the interdistrict remedy within Uni-Gov was vacated and remanded for further proceedings. We said:

> The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken.* 503 F.2d at 86.

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1. The Indiana Statute, Acts 1974, P. L. 94, § 1; I. C. 1971, 20-8.1-6.5-1, Burns Ind. Stat. Ann. § 28-5031 (1971), provides in pertinent part:

> This chapter applies solely in a situation where a court of the United States or of the State of Indiana in a suit to which the transferor or transferee corporation or corporations are parties has found the following: (a) a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders; (b) a unitary school system within the meaning of such Amendment cannot be implemented within the boundaries of the transferor corporation, and (c) the Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such Amendment.

On remand, in *Indianapolis IV* (unreported opinion), the district court held another evidentiary hearing on Uni-Gov and housing practices within Marion County. In regard to Uni-Gov Judge Dillin found:

> The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons . . . . When the General Assembly [which under state and federal law had a duty to alleviate segregation in IPS] expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation [*sic*] IPS.

Referring to the suburban Marion County units of government, he stated:

> They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has [*sic*] been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.

With respect to the public housing authorities the district judge said:

> The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations. Each of such

> locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.

Based on these findings and those set forth in his former opinions, Judge Dillin ruled that an interdistrict remedy was necessary to effect desegregation within IPS. He again found that if desegregation were limited to IPS, schools within IPS would become 42 percent black, and that this percentage exceeded the "tipping point" at which resegregation would occur. He commented:

> The Court of Appeals has called the attention of this Court to the rule of law that "white flight" is not an acceptable reason for failing to dismantle a dual school system. 503 F.2d 80, citing *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 491, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1970). However, it does not follow that this Court must ignore the probability of white flight in attempting to formulate guidelines for IPS to follow in accomplishing the final desegregation of its schools. In other words, as this Court sees it, white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action.

Judge Dillin therefore ordered the transfer of 6,533 students from IPS to other school districts in Marion County. An additional 3,000 students were to be transferred in the second year of the plan, raising the proportion of black students in the

suburban schools to 15 percent.[2] No transfers were ordered to Washington and Pike Townships, which already had black populations of 12 and 4 percent. The district court also enjoined the Housing Authority from building any more family housing projects in IPS territory and from renovating an all black project called Lockefield Gardens. Finally, the Buckleys were awarded attorneys' fees under 20 U. S. C. § 1617.

All the defendants have appealed. The defendants other than the Housing Authority challenge the interdistrict transfers ordered by the district court. The Housing Authority challenges the injunction against it. On the other side, the Buckleys, together with an *amicus curiae,* the Coalition for Integrated Education, argue for affirmance of the district court order. The United States argues that the finding of interdistrict violations should be sustained but seeks modification of the portion of the order calling for mandatory interdistrict transfers of students. It argues for affirmance of the injunction against the Housing Authority.

II

Facts Pertinent to This Appeal

A. Residential and School Demography of Marion County

In 1969 when Uni-Gov was created, 95 percent of the blacks in Marion County lived in Indianapolis. Only about 50 percent of the whites in the county lived in the city. The black population continues to grow within the core city as reflected by the ratios in the schools. The percentage of black students in IPS increased from 36 percent in 1968 to 42 percent in 1975. The 1974-1975 black/white ratio in IPS was 57.22 percent white and 42.16 percent black. On the other hand, the overall ratio in Marion County was 74.87 percent white and 24.40 percent

2. IPS will be obligated to pay the suburban school districts the cost of educating the transferred pupils. See *supra,* n. 1.

black.[3] For the years 1974-1975 the racial composition of the suburban school districts within Marion County was as follows:

Township	Percentage of White	Percentage of Black
Decatur	99.83	.9
Franklin	99.35	.54
Lawrence	95.50	2.9
Perry	98.64	.23
Warren	98.61	.73
Wayne	97.87	1.19
Beech Grove	99.64	.04
Speedway	99.10	.72

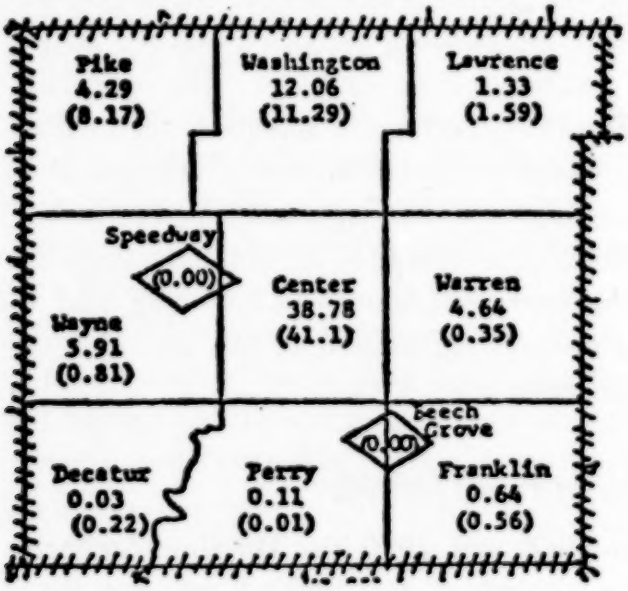
B. Uni-Gov

Until 1969 the boundaries of IPS corresponded roughly to the boundaries of the City of Indianapolis, and the other Marion

3. The black population in Marion County is reflected by the following map.

1973

Percentage of Black Residents in Marion County
(Percentage of Black Students in Marion County Schools)



County school districts were truly suburban. In 1969, however, the so-called Uni-Gov Act, which is officially titled the "First Class Consolidated Cities and Counties Act," Acts 1969, ch. 173, § 101; I. C. 1971, 18-4-1-1 *et seq.*, Burns Ind. Stat. Ann. §§ 48-9101 *et seq.* (1971), transformed Marion County into a consolidated metropolitan government. School districts were specifically excluded from Uni-Gov.

Uni-Gov is governed by a mayor and council. Its purpose was to efficiently reorganize civil government within Marion County. Previously, there had been a splintering of governmental responsibility into loosely controlled agencies with overlapping jurisdictions. Uni-Gov has succeeded to most of the functions of county government and of numerous special service districts. It has also succeeded to the functions of the City of Indianapolis and provides municipal services such as police and fire protection within the approximate area of the old city. The Act contains provisions for expanding the areas in which Uni-Gov delivers these municipal services. See, *e.g.*, I. C. 1971, 18-4-12-36 (fire district); I. C. 1971, 18-4-12-8 (police district).

Uni-Gov has not, however, replaced all existing governmental units in Marion County. For example, the airport authority, the county courts, the building authority, and the hospital corporation were excluded from Uni-Gov. The so-called "excluded cites" of Speedway, Perry, and Lawrence retain their own local governments which provide municipal services in those areas. Nonetheless, Uni-Gov has significant powers even in the excluded cities. It is in charge of air pollution regulation, building code enforcement, and municipal planning and thoroughfare control. Moreover, the citizens of the excluded cities vote in Uni-Gov elections.

C. History of Public Housing

Between 1966 and 1970 the Housing Authority built and opened for occupancy ten housing projects for low-income

families. These and Lockefield Gardens, which was built during the depression, are the only public housing projects for family occupancy in Marion County, although other forms of subsidized housing are available. All ten projects were built within the boundaries of IPS. These projects opened with 50 to 75 percent black occupancies and are now 98 percent black.

The Housing Authority was authorized under state law to construct projects within Indianapolis and within five miles of the city's boundaries. Federal funding could be obtained only if the Housing Authority entered into a cooperation agreement with the municipality or other civil governmental entity having jurisdiction over the territory in which it desired to build. The City of Indianapolis entered into a cooperation agreement with the Housing Authority, but no other governmental entity in Marion County did so, even though the Housing Authority approached the county commissioners about an agreement.

Since 1969, when Uni-Gov became effective, the Housing Authority has apparently had the authority to construct projects outside the old city limits, except in the Towns of Speedway, Lawrence, and Beech Grove, without the need for cooperation agreements. No housing projects have been commenced within or outside IPS since that time nor are any planned. The record does not show why. There are presently pending applications for approximately 3,000 families.

The Housing Authority argued that suitable sites did not exist outside the City of Indianapolis because services such as public transportation would have been unavailable. There was evidence, however, that these services could have been arranged. The evidence showed that public transportation routes could have been extended to areas of demonstrated need, that food stamp distribution offices could have been established at the projects, that sewage services could have been obtained by contract with the city, and that police and fire protection could have been obtained from the city.

Six of the housing projects are on the IPS boundary lines or within a few blocks thereof. For example, Clearstream Gardens was located on the IPS side of a street which divided IPS and Warren Metropolitan School District. A witness for the Housing Authority under questioning by the district court, was unable to state why, "from the standpoint of these criteria you mentioned," there was "any difference at all between the location on the east side or the west side of Emerson Avenue." The other projects and their locations are set forth below.[4] These projects contain between 900 and 1,000 family units and house a substantial number of black school children.

D. History of School District Boundaries

Until 1969, under a variety of laws which are discussed below, the IPS boundaries were largely coterminous with the city boundaries. Under a 1931 act, the boundaries of IPS were made coterminous with those of the city. Acts 1931, ch. 94, §1; I. C. 1971, 20-3-11-1, Burns Ind. Stat. Ann. § 28-2601 (1971).[5] Until 1959, boundaries of school districts and municipalities were also coterminous elsewhere in Indiana, with some

4. Rowney Terrace is ten blocks north of Clearstream Gardens on the same boundary line between IPS and Warren Metropolitan School District (MSD).

Raymond Villa is approximately four blocks north of the boundary line between IPS and Beech Grove.

Laurelwood is in a narrow peninsula of IPS that is surrounded on three sides by Perry MSD.

Concord Village is approximately one-half mile from the Speedway boundary.

Eagle Creek is on the boundary line between IPS and Wayne MSD.

5. Acts 1963, ch. 310, § 4; I. C. 1971, 20-3-11-33, Burns Ind. Stat. Ann. § 28-2633 (1971), provides that the 1931 act remains in effect except to the extent that its various provisions are inconsistent with the 1959 act discussed in the text. The provision of the 1931 act making IPS boundaries coterminous with those of Indianapolis is inconsistent with the 1959 act and consequently was not reenacted by the 1963 act. The 1963 act did not purport to affect the provisions of the 1961 act discussed in the text.

exceptions, and the IPS boundaries merely reflected the generally prevailing condition.

In 1959 the Indiana School Reorganization Act, Acts 1959, ch. 202, § 1; I. C. 1971, 20-4-1-1 *et seq.*, Burns Ind. Stat. Ann. § 28-3501, n (1971), created a complex scheme for consolidating school districts. Consolidations under the Act reduced the number of school districts outside Marion County from 990 to 305. Some 70 percent of reorganized districts were not coterminous with other units of civil government. In some cases consolidated school districts crossed county lines.

Marion County, however, was an exception. School districts there were not consolidated. The Marion County Reorganization Committee, appointed pursuant to the Act, initially recommended that all school systems in the county be merged into one, but the unanimous opposition of the suburban school districts defeated the merger proposal. There is no evidence that this opposition was racially motivated.[6] The Committee's ill-fated consolidation proposal was intended to "develop equal educational opportunities for all children in Marion County," and to "eliminate the confusion of school transfers and dislocations involved in annexation proceedings."

The most substantial reasons against consolidation noted in the Committee's report were that a consolidated school district would be large, with consequent loss in citizen participation and interest in school affairs, and that merger would result in increased school taxes in IPS and two of the suburban districts. The Committee explained that the consolidation plan "had no widespread support—only organized opposition," and that it did not wish to "force a plan (however sound in its conception) upon an unwilling or reluctant public." So, although it believed the arguments in favor of its plan far outweighed the opposition

6. The district judge's comment is pertinent. "In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none, . . . " *United States* v. *Board of School Commissioners,* 368 F. Supp. at 1203.

arguments, the Committee, as the district court found, "[R]eversed itself and proposed a plan which, with minor exceptions . . . froze all existing school corporations in Marion County according to their then existing 1961 boundaries." *United States* v. *Board of School Commissioners*, 368 F. Supp. 1191, 1203 (S. D. Ind. 1973). The Committee thereby abandoned both its merger plan and a less radical plan which would have restructured school boundaries on what the Committee regarded as a more rational basis than existing boundaries. Accordingly, the plan adopted in 1962, after approval by the state, did not significantly change boundaries in Marion County, but left those boundaries coterminous with those of civil governmental bodies.

As a result of the 1959 Reorganization Act, school boundaries in most of the state were frozen and thereafter unaffected by municipal annexations. In 1961, however, special legislation was enacted to give the schools within Marion County the flexibility lost by the 1959 Reorganization Act. Acts 1961, ch. 186, § 1; I. C. 1971, 20-3-14-1 *et seq.*, Burns Ind. Stat. Ann. § 28-3610 (1971). Under the 1961 act extension of the boundaries of a civil city automatically extended the corresponding school district boundaries unless the school city and the losing school corporation mutually agreed that the school city territory would not expand with the civil city. The school district whose territory was to be taken could also oppose the civil annexation in a remonstrance suit. The annexation powers of the city, however, proved to be illusory, for they were effectively frustrated by remonstrance litigation.[7]

Another means of annexation under the 1961 act was by mutual agreement between school corporations. IPS (and other school districts with boundaries corresponding with those of a civil city) also had a unilateral power of annexation subject to the right of the school district whose territory was to be taken

7. This frustration of the city's annexation efforts was one of the reasons for Uni-Gov given by Mayor Lugar in his testimony before the district court.

to oppose by remonstrance. No significant action was taken by IPS under this provision.

In summary, until 1969, the combined action of the State of Indiana and its political subdivisions had the effect of leaving the boundaries of the City of Indianapolis and IPS substantially the same despite statewide school district consolidations made under the 1959 act. True, IPS could expand independently of the city, but the city's annexation prima facie carried IPS with it. Although it turned out that no annexations occurred, the policy of the state, as expressed in the 1961 legislation, was that IPS would expand along with the city.

In 1969, after this action was filed, two other acts were adopted. One act, Acts 1969, ch. 52, § 3; I. C. 1971, 20-3-14-9, Burns Ind. Stat. Ann. § 28-3618 (1971), adopted sixteen days before Uni-Gov was enacted, amended the 1961 act by abolishing the power of IPS to follow municipal annexations. Another act, Acts 1969, ch. 239, § 407; I. C. 1971, 18-5-10-25, Burns Ind. Stat. Ann. § 48-722 (1971), limited the remonstrances against municipal annexations to a few, simple, fairly objective grounds.

III.

The overall issue in this appeal is whether the limited interdistrict remedy ordered by the district court is supported by the record and is in accord with the legal principles enunciated in *Milliken* v. *Bradley*, 418 U. S. 717 (1974). Subsumed in the issue are two questions: (1) whether the establishment of Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov, and (2) whether the district court correctly enjoined the Housing Authority of the City of Indianapolis from locating any additional publicly funded housing projects within the boundaries of IPS and from renovating any existing facility for other than the elderly.[8]

8. The school district defendants argue that our mandate limited inquiry on remand to Uni-Gov itself. It is true that our remand

(Continued on next page)

In our opinion, *Milliken's* essential holding is contained in the following language written by Mr. Chief Justice Burger:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U. S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. *Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.* Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by

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(Continued from preceding page)

"[F]or further proceedings consistent with" *Milliken* v. *Bradley* was qualified by the specific direction to "[De]termine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken.*" *United States* v. *Board of School Commissioners,* 503 F. 2d 68, 86 (7th Cir. 1974), *cert. denied,* 421 U. S. 929. This direction, however, was itself qualified by a footnote quoting from passages in the opinion of the Court in *Milliken* and in Mr. Justice Stewart's concurring opinion. Both passages mention the drawing of school district lines on the basis of race as a possible ground for interdistrict relief; the former also includes as a possible ground discriminatory acts of other school districts; and the latter mentions "[P]urposeful, racially discriminatory use of state housing or zoning laws" by state officials. *Id.* at n. 23. We interpret the mandate as sufficiently broad to permit consideration of official conduct which arguably bears a historical relationship to the failure to expand the IPS boundaries to match those of Uni-Gov, which includes the failure to change IPS boundaries during the 1959-1962 Indiana school reorganization program and the failure to locate any public housing outside the IPS boundaries. On the intervening plaintiffs' theory of the case, which the district court adopted, this course of conduct was a part of a pattern, of which Uni-Gov was also a part.

> the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy. (emphasis added.) *Milliken* v. *Bradley*, 418 U. S. 717, 744-45.

That holding was further explicated in *Hills* v. *Gautreaux*, 44 U. S. L. W. 4480, 4484 (U. S. April 20, 1976), where Mr. Justice Stewart wrote:

> The Court's holding that there [*Milliken* v. *Bradley*] had to be an interdistrict violation or effect before a federal court could order the crossing of district boundary lines reflected the substantive impact of a consolidation remedy on separate and independent school districts. The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.

In *Milliken* the majority opinion also noted that, "[I]n its present posture the case does not present any question concerning possible state housing violations." *Milliken* v. *Bradley*, *supra* at 728, n. 7. Mr. Justice Stewart, in his concurring opinion, explicitly explained the relevance of housing discrimination as it relates to an interdistrict remedy in school desegregation cases. Mr. Justice Stewart wrote:

> Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, . . . by transfer of school units between districts, . . . or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate. *Id.* at 755.

With these holdings in mind we turn to the issue of Uni-Gov as it relates to an interdistrict violation.

Although Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil govern-

ment within Marion County, it cannot be analyzed in isolation if its impact on school district boundaries is to be clearly perceived. Rather it must be considered in conjunction with the two other acts adopted in 1969. (See *supra* pp. 12-13.)

For some time Mayor Lugar had expressed his desire to embark on a more aggressive annexation program in order to bring a greater part of the urbanized area under the city's control. The concept of Uni-Gov was promoted as a more viable alternative to lengthy annexation litigation.[9] The suburban school corporations and their legislative representatives were obviously aware that if Uni-Gov did not pass and the civil city was forced to embark on a more aggressive annexation program as a last resort to reorganizing governmental services, IPS boundaries would automatically extend with the civil city boundaries under the 1961 Annexation Act.[10] In order to avoid this undesired result Chapter 52, 1969 Acts was enacted sixteen days before Uni-Gov was adopted. This Act repealed the provision in the 1961 Act which provided for automatic extension of school city boundaries with the extension of civil city boundaries. Chapter 239, 1969 Acts was also adopted, limiting remonstrances against municipal annexations to a few, simple, fairly objective grounds.

It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this action was pending in district court. These "fail safe" measures indicated a legislative intent (reflecting local sentiments) that by one means or another the boundaries of IPS would not expand with those of the civil city. We say this because a court is entitled to draw reasonable and logical inferences from

9. Prior city administrations had not strongly pursued civil annexations and those that had been adopted were being effectively thwarted by remonstrances in the courts.

10. Under the 1961 Annexation Act the only way to avoid automatic extension of the school city boundaries, other than by remonstrance, was by mutual agreement between the acquiring and losing school corporations that the school city boundaries would not extend with the civil city boundaries.

probable consequences of changes in the law and the evident purpose of such changes.

Because, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were "[A] substantial cause of inter-district segregation." *Milliken* v. *Bradley*, 418 U. S. 717, 745 (1974), and "[C]ontributed to the separation of the races by . . . redrawing school district lines. . . ." *Id.* at 755 (Stewart, J., concurring).

The General Assembly, under both federal law as expressed in *Brown* v. *Board of Education*, 349 U. S. 294 (1955), and in *Green* v. *County School Board*, 391 U. S. 430 (1968), and Indiana law as expressed in Acts 1949, ch. 186, §§ 1-6, 8, as repealed by Acts 1973, P. L. 218, § 1; I. C. 1971, 20-8.1-2-1 —20-8.1-2-7, Burns Ind. Stat. Ann. § 28-5304 (1971), had an obligation to alleviate the segregated condition in IPS. The record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation. The desirability for a unitary civil government should not have precluded the General Assembly from considering the needs of the school system in its decision to enact Uni-Gov. As we noted earlier, the most substantial reasons advanced against the consolidation of the schools in Marion County when it was under consideration in 1959 were that a consolidated school district would be large, with consequent loss of citizen participation, and that it would increase taxes. These considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact. Administrative convenience cannot be a justification for violating the Equal Protection Clause. The district court correctly observed, "When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [*sic*] IPS."

In summary, we are convinced that the essential findings for an interdistrict remedy found lacking in *Milliken* are supplied by the record in the instant case. In *Milliken* the Supreme Court noted that the Detroit school boundaries were coterminous with the civil city boundaries and "[W]ere established over a century ago by neutral legislation . . . ." *Milliken* v. *Bradley*, 418 U. S. 717, 748 (1974). The Court also observed the district court did not find that the segregative acts within Detroit effected segregation within the other districts. *Id.* at 721. Furthermore, the suburban school districts had not participated in the proceedings, *id.* at 722, and finally, there had been no evidence of any racially discriminatory acts of the state which had been substantial causes of interdistrict segregation, *id.* at 745. The remedy chosen by the district court required a consolidation of fifty-four districts "into a vast new super school district," *id.* at 743.

Indianapolis presents an entirely different situation. The Indianapolis Legislature [*sic*] acted directly in passing Uni-Gov, thereby creating the existing situation which confines black students within IPS. Moreover, the suburban governmental units made it politically expedient that Uni-Gov not include the schools.

In this case we are dealing with a situation in which but for certain events chargeable to the state, Marion County would be either a consolidated school district under the 1959 School Reorganization Act or IPS would have been expanded with the civil city of Indianapolis under Uni-Gov. In this context there is nothing talismanic about the word "district", for school district lines are not sacrosanct. *Milliken, supra* at 744. The following hypotheticals are helpful in analyzing the problem.

> (a) City A has one school district, coterminous with City A. The Government brings a suit, alleging *de jure* segregation in the city schools, particularly in the northeast portion of the city. The defendant school board agrees that the northeast portion of the city must be desegregated, but argues that a district wide remedy is unnecessary,

that is, that only the schools in the northeastern portion of City A need be affected. On these facts, *Keyes* v. *School District No. 1*, 413 U. S. 189, 208 (1973), would control.

(b) City B has one school district that is coterminous with city boundaries. Perhaps fearing an impending desegregation suit, City B decides to contract its school district boundaries so that the school district encompasses the bulk of the central city while the outlying areas of the city organize their own school districts. On these facts, no federal court in a desegregation suit would hesitate in ordering the crossing of district lines to effect a remedy.

(c) City C decides to expand its boundaries and annexes the suburbs surrounding it into a unitary civil government. However, it retains its school district boundaries, previously coterminous with its former city boundaries. In every other respect it provides full city services in and exercises full city authority over the newly acquired territory. These facts are analogous to those of the case at bar. In the event of a meritorious desegregation suit in hypothetical City C, a district court could properly order an interdistrict remedy under *Milliken*.

There is no dispute that a school district may not contract its territory in order to avoid desegregation. *Cf. Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972). Conversely, a city should not be permitted to extend its boundaries in order to avoid desegregation.

Evans v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd*, ... U. S. ....., 44 U. S. L. W. 3299 (1975), is a case which is factually analogous to the instant case in many respects and in accord with *Milliken*. In *Evans* the district court had to consider the segregative effects of the Education Advancement Act of 1968, a Delaware school reorganization statute, which explicitly excluded the Wilmington district from a general reorganization of Delaware school districts. Although the district court concluded that the provisions excluding the Wilmington district from school reorganization were not purposefully, racially discriminatory, this did not end its inquiry.

The court noted, "Statutes that do not explicitly deal with race but have a pronounced racial effect, . . . can also establish suspect racial classifications." *Evans* v. *Buchanan, supra* at 441. It further stated that "[W]here a statute, either explicitly or effectively, makes the goals of a racial minority more difficult to achieve than other related governmental interests, the statute embodies a suspect racial classification and requires a particularly strong justification." *Id.* The court therefore held that the Education Advancement Act, although racially neutral on its face, "[H]ad a significant racial impact on the policies of the State Board of Education, . . ." *id.* at 442-443, and thereby constituted a suspect classification. In effect, the statute prevented a predominantly black school district from being reorganized with a predominantly white suburban school district while other districts in the state were able to consolidate. The court finally concluded that "Neither . . . interest in preserving a historic school district boundary, nor the interest in maintaining districts with enrollments below 12,000 . . .," *id.* at 445, was a compelling state interest and did not justify the exclusion of Wilmington in the Education Advancement Act. On this basis the district court ordered an interdistrict remedy. The Supreme Court summarily affirmed.

In light of the above we find that the limited interdistrict remedy ordered by the district court was proper.

IV.

We now turn to the housing issue. As we stated above 95 percent of the black residents of Marion County live in the inner city. Surrounding the inner city are suburbs populated largely by white residents. This phenomenon may have many causes, but we think the district judge was correct in finding as the primary reason discrimination in the availability of housing opportunities for blacks in the suburbs. We are in agreement with Judge Dillin's statement:

> Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else. *United States* v. *Board of School Commissioners,* 68 F. Supp. 1191, 1204 (S. D. Ind. 1973).

Although the Housing Authority had jurisdiction outside the IPS boundaries, it did not locate any of the public housing projects in that territory. Instead, all ten of the public housing projects whose occupancy is 98 percent black were located within IPS. It is obvious that there is a close relationship between the racial balance in housing and the racial balance in schools. As Judge Dillin found in his 1971 opinion, "Low-rent housing projects within the School City have significantly affected the racial composition of the schools." *United States* v. *Board of School Commissioners,* 332 F. Supp. 655, 673 (S. D. Ind. 1971). He reaffirmed this in his most recent decision, "The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory." The record supports these findings and clearly shows a 'purposeful, racially discriminatory use of state housing." *Milliken* v. *Bradley,* 418 U. S. 717, 755 (1974) (Stewart, J., concurring). The Government's statement in its brief supports this view:

> Given that a disproportionate number of blacks are both in low income categories and were already concentrated in IPS and considering the predominantly black composition of the pool of applicants for the H.A.C.I. low-income housing projects, it is a reasonable inference that this action would and did have a further impact upon the racial compositions of schools and school districts in Marion County.

The Housing Authority contends the district court had no authority to enjoin it from building additional public housing

within IPS and from renovating Lockefield Gardens for other than the elderly because the court could not lawfully find a constitutional violation by HACI in confining its housing projects to IPS territory. The evidence presented above, however, is to the contrary.

By locating its projects within IPS and in many cases near all black neighborhoods, the Housing Authority significantly contributed to the disparity in residential and school populations between the inner city and the suburbs. Its acts produced discriminatory effects both within IPS and the suburbs. The relief ordered by the district court was directed to correcting the effects of those past discriminatory acts. Accordingly, the district court did not abuse its discretion in enjoining the Housing Authority from building additional projects within IPS. That part of the injunction that relates to Lockefield Gardens was also proper since permitting it to be used for family housing, where school children are undoubtedly involved, would only further aggravate the school segregation problem.

V.

The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken*, the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning. We fail to see how the district court abused its discretion when it was clearly acting within the guidelines of *Milliken*. It was not an abuse of discretion merely because the Government would have preferred another remedy.

Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated

root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete desegregation. History has taught us that "freedom of choice" plans produce negligible results. *Green* v. *County School Board,* 391 U. S. 430 (1967).

Even if we were to agree with the Government that voluntary transfers are desirable, Indiana law provides no secure mechanism for achieving this result. The Government suggests that voluntary transfers can be made in accordance with Acts 1973, P. L. § 1; I. C. 1971, 20-8.1-6-1, Burns Ind. Stat. Ann. § 28-5001 (1971), which permits transfers under certain conditions.[11] We do not agree, however, that this law is sufficient to provide for the kind of transfers the district court ordered. The language in the statute is permissive and vague (a transfer *may* be granted if the school corporation feels a child may be better accommodated in another school) and does not contemplate transfers for desegregation purposes. We could hardly believe we were carrying out our duty to dismantle segregation root and branch if we were to choose this law to accomplish our goal.

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11. The statute provides:

> Transfer—General order. — The governing body of any school corporation may grant an order of transfer upon proper application by the parent of any child who resides in that corporation if it feels the child may be better accommodated in the public schools of another school corporation of this state or of an adjoining state. In determining whether a child can be better accommodated, such matters as the proximity of the schools to the residence of the child desiring the transfer, the kind and character of the roads, the means of transportation, and the crowded conditions of the school shall all be pertinent. If there is no high school in the school corporation in which a child resides, the governing body shall grant an order of transfer. When a transfer is granted under this section, transfer tuition shall be paid as provided in this chapter.

The limited interdistrict remedy ordered by the district court is supported by the record and in accord [*sic*] the legal principles enunciated in *Milliken.*

In affirming the district court's order, we suggest that the court monitor the transferance of black pupils from IPS to the other school districts periodically, perhaps on a yearly basis, in order that modifications, if necessary, may be made. This is in the hope that segregation and discrimination will be completely eradicated within IPS in furtherance of the goal of equal opportunity proclaimed two hundred years ago in the Declaration of Independence.[12]

AFFIRMED.

Tone, *Circuit Judge,* dissenting.* There are only two possible interdistrict constitutional violations, in view of our decision on the second appeal, *United States* v. *Board of School Commissioners,* 503 F. 2d 68 (7th Cir. 1974), *cert. denied,* 421 U. S. 929 (1975), as the majority recognizes. These two possibilities are Uni-Gov and the Housing Authority's location of public housing, as to both of which the District Court heard evidence and made findings on remand.

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12. Supplementing Judge Tone's footnotes to his dissent, the author of this opinion acknowledges extensive borrowing from Judge Tone's original draft of an opinion, particularly with respect to the factual background of this case. That use made my task easier, and I am indeed grateful.

* The writing of the court's opinion was initially assigned to me, my tentative vote at conference having been to affirm. After I had devoted much time toward the preparation of an opinion, I came to the view reflected in this dissent. The writing of the court's opinion was therefore reassigned to Judge Swygert, who was already burdened with his share of the work of the Seventh Circuit but nevertheless had to find time for this case. While the results of my work on the record, which I made available to him, were I hope of some use in connection with the writing of his opinion, he got a very late start because of the circumstances just described. I recite this intramural history to record the reason for the unusual delay between oral argument and decision and the fact that Judge Swygert is not responsible for that delay.

Whether these state actions violated the Equal Protection Clause depends upon the existence of a racially discriminatory purpose. Disproportionate effect on minorities without discriminatory purpose is not enough. If this was not clear after *James* v. *Valtierra*, 402 U. S. 137 (1971), *Jefferson* v. *Hackney*, 406 U. S. 535, 548-549 (1972), and *Keyes* v. *School District No. 1*, 413 U. S. 189, 208 (1973), it was made so by *Washington* v. *Davis*, 44 U. S. L. W. 4789 (U. S., June 7, 1976). The Court squarely held in the latter case that equal protection is denied only when the state acts with a racially discriminatory purpose:

> "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. [Original emphasis.]
>
> * * * * *
>
> "The school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.
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> * * * * *
>
> ". . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 44 U.S.L.W. at 4792, 4793.

The record before us does not contain findings or evidence that the state acted with a racially discriminatory purpose in connection with Uni-Gov or public housing siting.[1] An essential element of an equal protection violation is therefore missing.

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1. The criterion of racially discriminatory purpose is, of course, often not easy to apply. Even if, in any given case, a body such as a legislature or school board can be said to have a collective intent (see R. Dickerson, *The Interpretation and Application of Statutes* 67, *et seq.* (1975)), that intent is often difficult to ascertain. See Justice

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One other governing principle should be noted at the outset. *Milliken* v. *Bradley,* 418 U. S. 717 (1974), in language we are not free to ignore, focused on the constitutional right to be vindicated. Amplifying the statement quoted by the majority that "the scope of the remedy is determined by the nature and extent of the constitutional violation," *id.* at 744, the Supreme Court said two pages later:

> "Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system. . . .
>
> "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either

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Powell's concurrence in *Keyes,* 413 U. S. at 217, 233-234. For this reason Justice Stevens, concurring in *Washington* v. *Davis,* observed that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume," and based his concurring vote, in a manner reminiscent of Justice Harlan's concurring opinion in *Hunter* v. *Erickson,* 393 U. S. 385, 393 (1969), on the objective indicia that the governmental action was grounded on neutral principle. In the case at bar, this problem is not as knotty as it often is. Uni-Gov satisfies the neutral principle standard, and the search for collective legislative intent, which able counsel must have made, seems to have turned up no evidence whatsoever of racially discriminatory purpose on the part of anyone responsible for the legislation. The housing siting decisions are in a similar posture.

> constitutional principle or precedent." *Id.* at 746-747 (footnote omitted).

That *Milliken* controls here, apart from the additional evidence on Uni-Gov and public housing, was of course recognized in our decision on the second appeal, in which we reversed the portion of the District Court's order calling for interdistrict relief outside the Uni-Gov territory. That decision was a recognition that, in the language of *Milliken*, "[t]he constitutional right of the Negro respondents residing in [IPS] is to attend a unitary school system in that district," *id.*, and an interdistrict remedy is not an appropriate means of vindicating that right. The question now is: What other constitutional rights, violation of which calls for an interdistrict remedy, were shown on remand to have been violated by Uni-Gov and the siting of public housing projects? The majority does not seem to me to answer that question.

The District Court did not find that the legislative decision to exclude IPS from Uni-Gov was racially motivated.[2] The record would not have supported such a finding in view of both the absence of any direct evidence of such a motivation and the presence of such evidence as the historic context of opposition to county-wide school consolidation on non-racial grounds,[3] the

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2. Such a finding cannot be inferred from the District Court's statement that by not consolidating the schools under Uni-Gov, the General Assembly "signaled its lack of concern with the whole problem and thus inhibited desegregation with[in] IPS." Apart from doubt about whether there is any evidence that Uni-Gov had an inhibiting effect on desegregation, as distinguished from not promoting desegregation, the court has merely described an effect and not a purpose. A "lack of concern" does not amount to a racially discriminatory purpose. The state, like Michigan in *Milliken*, was under no direct constitutional duty to adopt interdistrict measures, and a duty to act could hardly arise from the fact that failure to act would "signal a lack of concern."

3. There is no evidence, as the majority recognizes, that the opposition to consolidation of Marion County School districts under the Indiana School Reorganization Act of 1959 (Ind. Code § 20-4-1-1, *et seq.*), was racially motivated. Nor is there any evidence that the failure to consolidate after that time or opposition to civil annexation was racially motivated. The District Court, in the course

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decision to leave other government units out of Uni-Gov,[4] the fact that all school boundaries elsewhere in the state were already frozen, and the non-racial reasons and the haphazard fashion in which civil annexation had taken place in the past, which had done nothing to establish rational school boundaries.[5] The appellees do not argue that the evidence shows a racially discriminatory purpose. In their briefs, filed before the decision in *Washington* v. *Davis,* the government assumes, and the intervening plaintiffs argue, that such a purpose need not be shown.

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of the hearing on remand after our decision on the second appeal, spoke of the purpose of certain exhibits as being offered "to prove or tend to prove that the present division of Marion County into eleven separate school districts is something that happened because of reasons pertaining primarily to school finances as well as to the desire of non-IPS schools to maintain local autonomy rather than for reasons of separating students based on race. . . . I presume that if the Government or the intervening plaintiffs had some evidence to the contrary that they would be cross-examining, or examining along those lines." [March 1975 Tr., Vol. III, pp. 359-360.] Neither the government nor the intervening plaintiffs offered any "evidence to the contrary" or cross-examined along the lines referred to.

4. Among those other governmental units were the Airport Authority, the Health and Hospital Corporation, the County Department of Welfare, the Building Authority, and the Library Districts. See Ind. Code § 18-4-3-14. The so-called "excluded cities" of Speedway, Perry and Lawrence [sic] retained their own local governments, which provide municipal services in those areas, although Uni-Gov has the responsibility even in those areas for air pollution regulation, building code enforcement, municipal planning, and thoroughfare control.

5. The record indicates that the reasons for this and the resulting irregularities in the boundaries of Indianapolis were that in many instances residents protested annexation because they felt the city would not provide them with services commensurate with the additional tax money they would be paying (not an uncommon reason for opposition to annexation by municipalities large and small throughout the country), and in other instances commercial developers sought and gained the annexation of land they owned because they wanted benefits that could be obtained through annexation. Thus whether this land was annexed depended in large part upon the position taken by the owners of the land affected. [March 1976 Tr., Vol. II, pp. 219-220.]

A search in the opinion of this court's majority for a finding of racially discriminatory purpose will be unproductive. The majority finds (text at notes 9 and 10) that the General Assembly did not want IPS boundaries to expand with the city boundaries whether or not Uni-Gov was adopted[6] but does not follow with a statement that this desire or the actions effectuating it were racially motivated. Instead it goes on to state, citing *Milliken*, that "Uni-Gov and its companion 1969 legislation were 'a substantial cause of interdistrict segregation' . . . and 'contributed to the separation of the races by . . . redrawing school lines. . . .'"[7] But under *Milliken*, as explained in *Washington* v. *Davis*, cause and effect are not enough. A racially discriminatory purpose is necessary. The closest the majority comes to finding a racially discriminatory purpose is in the abstract statement, at the end of the paragraph containing the three hypotheticals, that "a city should not be permitted to extend its boundaries in order to avoid desegregation." I believe that if this court intended to find as a fact that Uni-Gov was adopted with a racially discriminatory purpose, in the face of the failure of the District Court to find, and of the appellees to argue, that there was such a purpose, it would do so directly and state the evidentiary basis for that finding. As stated above, I believe there is no such basis in the record.

The majority attempts to avoid the necessity of finding discriminatory purpose by postulating an affirmative duty to desegregate under *Green* v. *County School Board*, 391 U. S.

6. This inference is drawn from the adoption of Chapter 52, 1969 Acts (Ind. Code § 20-3-14-9) seven days before the adoption of Uni-Gov and the adoption of Chapter 239, 1969 Acts (Ind. Code § 18-5-10-25). The effect of these two acts was to eliminate the automatic expansion of IPS boundaries to match the expansion of city boundaries and to limit remonstrances against annexations. These acts were rendered nugatory by the adoption of Uni-Gov.

7. Failing to redraw the school district lines does not seem to me to be "redrawing school district lines," but this is not important to an analysis of the problem, because the controlling question is whether, however the legislature's action is described, it was taken with a racially discriminatory purpose.

430 (1968), and the Indiana statutes. It is doubtful that the Indiana legislature could impose on itself by statute the duty to pass additional statutes, and, if it could, violation of such a duty would not give rise to a federal constitutional claim. *Milliken's* teaching is that the state's constitutional duty under *Green* is commensurate with the violation, which, apart from the Uni-Gov events themselves, was a violation of the right to attend a unitary school system within IPS. Under *Milliken*, there can be no affirmative duty to use interdistrict means to remedy intradistrict violations; for if such a duty existed, the State of Michigan surely violated it in that case, which would have mandated the interdistrict remedy rejected by the Supreme Court, and there was no reason in the case at bar to exclude the territory outside Uni-Gov from the scope of our remand on the second appeal.

Evans v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd*, 96 S. Ct. 381 (1975), on which the majority relies, does not in my opinion support affirmance. That case, unlike the case at bar, involved a prior interdistrict violation mandating the adoption of interdistrict measures by state authorities. The district court opinion in *Evans* shows *de jure* segregation before *Brown* v. *Board of Education*, 347 U. S. 483 (1954), was practiced on an interdistrict basis in the Wilmington area. 393 F. Supp. at 427. The state failed to carry its burden of showing that these past acts of segregation had become so attenuated that "the current segregation is in no way the result of those past segregation actions," *Keyes* v. *School District No. 1*, *supra*, 413 U. S. at 211, n. 17; in fact, post-*Brown* acts contributed to continued interdistrict segregation, see 393 F. Supp. at 434-436. Consequently, there was an affirmative duty to remedy the interdistrict violation, and the Delaware reorganization statute, by barring consolidation as a way of doing so, "contravene[d] the implicit command of *Green* v. *County School Board* . . . that all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43, 46 (1971).

The majority relies on the "racial impact" theory espoused by the district court in *Evans*. The summary affirmance of the three-judge district court's judgment does not necessarily imply approval of that court's reasoning, and that reasoning clearly cannot stand after *Washington* v. *Davis*.

In short, there is no finding and no evidence that the exclusion of IPS from Uni-Gov was racially motivated, and by all objective criteria Uni-Gov was racially neutral state action. Uni-Gov left untouched the boundaries of IPS, which had been established for racially neutral reasons. The changes in civil boundaries and reallocations of civil governmental functions made by Uni-Gov had no effect on the constitutional rights of school children in IPS.

Public Housing

The District Court, while unconvinced by the reasons given for the selection by the Housing Authority of certain sites near the periphery of the City of Indianapolis, made no findings that any of the Housing Authority's decisions were racially motivated. As the majority notes, under federal statute (42 U. S. C. § 1415(7)(b)(i)) and HUD guidelines, the Housing Authority could not obtain federal funds for a project in the absence of a cooperation agreement with the local governmental authority obligating the latter to provide essential governmental services; and as the District Court found, "Suburban Marion County officials have refused to cooperate with HUD on the location of such projects." It is apparent from the record and the District Court's findings that this was the real reason housing projects were built only within the City of Indianapolis before the effective date of Uni-Gov. There was no finding and no evidence that the refusals were racially motivated. Failure of local authorities to enter into these agreements, without more, does not give rise to an inference of racially discriminatory purpose, even though the projects are to be occupied by large numbers of blacks. See *James* v. *Valtierra, supra,* 402 U. S. at 141; see also *Metro-*

politan Housing Development Corp. v. *Village of Arlington Heights,* 517 F. 2d 409, 412-413 (7th Cir. 1975), *cert. granted,* 96 S. Ct. 560 (1975). As these cases hold, the state's location of low-rent housing projects for racially neutral reasons, even though it has a disparate effect on minority groups is not subject to strict scrutiny. *James* v. *Valtierra, supra,* 402 U. S. at 141; *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights, supra,* 517 F. 2d at 413.[8] As the majority notes, the record is silent as to why no housing projects were commenced within IPS since the effective date of Uni-Gov. Absent a showing of discriminatory intent, I find no ground on which to sustain the injunction against the Housing Authority.

Relief

In the absence of an interdistrict violation, there should be no interdistrict relief against the school corporation defendants. If I believed the majority were correct in finding interdistrict violations, I would agree that the remedy ordered by the District Court is within its discretion and would not have this court substitute its discretionary judgment for that of the District Court

8. The majority does not rely on other acts of the state and private parties that had the effect of confining blacks to the IPS area, to which the brief of the United States refers. These acts which include recording racial covenants, discriminatory FHA loan practices and private discrimination by brokers, sellers, and others, were referred to by the District Court as "customs and usages of both the officials and inhabitants of such areas" which "discourage[d] blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court." While the District Court was no doubt correct in this statement, the findings referred to and the evidence supporting it were all in the record at the time of the last appeal, when we held that *Milliken* precluded relief outside Marion County, and are similar to findings and evidence in *Milliken.* See 418 U. S. at 724, 728 n. 7. If these facts had sufficed to justify an interdistrict remedy, the Supreme Court in *Milliken* would presumably either have affirmed on the familiar principle that a reviewing court will affirm on any basis supported by the record, even if not relied on by the lower court, or else would have remanded for further consideration of the housing issue. See, *e.g., Dandridge* v. *Williams,* 397 U. S. 471, 475 n. 6 (1970).

by ordering only the voluntary-transfer remedy urged by the government. In this connection, I do note that even when no constitutional violation has occurred, Indiana law provides relief to a student who is prevented by school district lines from attending the school nearest his home, Ind. Code § 20-8.1-6-1, *et seq.*, and the school authorities seem to be obligated to grant such relief. *State ex rel. Smitherman* v. *Davis,* 283 Ind. 563, 571, 151 N. E. 2d 495, 498 (1958).

I further believe that since the Housing Authority, unlike HUD in *Hills* v. *Gautreaux,* 44 U. S. L. W. 4480 (U. S. April 20, 1976), has not been found to have engaged in purposefully discriminatory and therefore unconstitutional conduct, no relief against that agency is warranted.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

No. IP 68-CA-225.

UNITED STATES OF AMERICA,

Plaintiff,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Intervening Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; KARL R. KALP, as Superintendent of Schools; MARTHA MCCARDLE, as President of The Board of School Commissioners; WILLIAM M. S. MYERS, CARL J. MEYER, PAUL E. LEWIS, LESTER E. NEAL, CONSTANCE R. VALDEZ, W. FRED RATCLIFF, Members of The Board of School Commissioners of the City of Indianapolis,

Defendants,

OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN

TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;

Added Defendants,

CITIZENS FOR QUALITY SCHOOLS, INC.;

Intervening Defendant,

COALITION FOR INTEGRATED EDUCATION;

Amicus Curiae.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,

Cross-Claimants,

vs.

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Cross-Defendants.

MEMORANDUM OF DECISION.

This case comes before the Court for further hearing, pursuant to the direction of the Court of Appeals for the Seventh Circuit. 503 F. 2d 68 (1974) cert. den. ..... U. S. ....., 43 USLW 3571 (April 21, 1975). The previous history of the case, and of various related actions, is fully set out at 503 F. 2d 71-75, and will not be repeated here. The names of certain defendants sued in a representative capacity, and whose terms have expired, have been deleted and their successors substituted.

This Court was specifically directed to determine whether the establishment of the Uni-Gov boundaries of the City of Indianap-

olis[1] without a like re-establishment of Indianapolis Public Schools boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken* v. *Bradley*, 418 U. S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974). Pursuant to such direction, a further evidentiary hearing was held, beginning March 18, 1975, and the parties have submitted both oral argument and briefs, all of which have been considered. The Court has also given consideration to other matters raised by the pleadings and evidence, and to matters of Indiana Law, all as will more fully appear.

The defendant Board of School Commissioners (IPS) on September 29, 1971, brought into the case as additional defendants, The Metropolitan Development Commission of Marion County (Commission) and The Housing Authority of the City of Indianapolis (HACI), and by way of a cross-complaint charged them with implementing policies which contributed to the segregation of IPS. Declaratory relief was demanded. These issues were not taken up heretofore, but in its pretrial entry of December 13, 1974 the Court ruled that, in addition to the Uni-Gov issue, the issue of the effect, if any, of the housing and zoning laws, rules, regulations and customs in Marion County, Indiana and its various political subdivisions upon the de jure segregation of IPS, would be considered. The greater part of the evidence introduced at the March hearing was on the latter subject.

The issue regarding housing and zoning laws was not mooted by *Milliken*. To the contrary, the concurring opinion of Mr.

1. The boundaries of the city, pursuant to Uni-Gov, are co-extensive with the boundaries of Marion County, except that the cities of Beech Grove and Lawrence ("excluded cities") and the unincorporated town of Speedway ("excluded town") are permitted to carry on as separate municipal corporations within the territory of the consolidated City of Indianapolis. Citizens of these communities have a dual status—for example, a Beech Grove voter may vote for Mayor of Indianapolis, members at large of the City County Council, Mayor of Beech Grove, and city councilmen of Beech Grove.

Justice Stewart, which constituted the decisive vote as between an otherwise evenly balanced Court, stated, "Were it to be shown . . . that state officials had contributed to the separation of the races by drawing or redrawing school district lines . . .; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate." 418 U. S. at 755.

The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations. Each of such locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.

The evidence in the record, as taken in all hearings, clearly shows that the suburban Marion County units of government, including the added defendant school corporations, have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban

Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.

In its most recent opinion, 503 F. 2d at 80, the Court of Appeals specifically concluded, with this Court, that state officials of the State of Indiana "have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries. . . ." Inasmuch as certiorari has been denied by the Supreme Court, the finding that the State has promoted segregation and inhibited desegregation within IPS is, quite obviously, the law of the case. The new findings of this Court that the Commission and HACI have been guilty of such acts simply amplifies such earlier findings. The action of these agencies in confining poor blacks to the inner city has directly and proximately contributed to cause the suburban school districts within Marion County, other than Washington Township and Pike Township, to be and remain segregated white schools, with segregated white faculties and administrative staffs.

The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. However, the General Assembly of Indiana, with its members elected on a state-wide basis, was not, or should not have been, subservient to local pressures, and undoubtedly could have legislated a county-wide school system for Marion County as easily as it legislated a county-wide civil government. Under existing law, both Federal as expressed in *Brown* v. *Board of*

Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), and in *Green* v. *County School Board*, 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968), and the law of Indiana as expressed in Acts 1949, Ch. 186, p. 603, Burns Ind. Stat. Ann. §§ 28-6106-28-6112 (1970), it had a duty to alleviate the segregated condition then existing in IPS. When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [*sic*] IPS.

The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited inter-district remedy within all of Marion County, Indiana, as hereafter described.

Recently, the General Assembly has taken some steps to meet its duty under the law—specifically by passing P. L. 94 of the Acts of 1974, Burns Ind. Stat. Ann. §§ 28-5031-28-5040, I. C. 1971, 20.-8.1-6.5-1, et seq., as added 1974. The Court of Appeals in its opinion at 503 F. 2d 74 refers to this statute as "rigidly limited in its application," which may well be, but in any event it does expressly recognize the power both of United States district courts and of the courts of the State to make orders regarding the transfer of pupils from one school corporation to another if certain conditions be found to exist, and affords a State policy and means for paying the costs of such inter-district relief, all of which was lacking in *Milliken*.

Specifically, the statute provides a means and method whereby a transferor school corporation may pay a transferee school corporation for the cost of education of a pupil transferred from the one to the other in compliance with a court order issued under the following conditions:

(1) In a suit where the transferor or transferee corporation or corporations are parties, the Court must have found the following:

(a) A transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders;

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor corporation; and

(c) The Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

In the case at hand, we have a suit in which all of the school corporations in Marion County, Indiana are parties, and in which this Court has made, and now reiterates, the following findings:

(a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders. *United States* v. *Board of Sch. Com'rs, Indianapolis, Ind.*, 332 F. Supp. 655 (S. D. Ind. 1971), aff'd 474 F. 2d 81 (7 Cir.), cert. den. 413 U. S. 920, 93 S. Ct. 3066, 37 L. Ed. 2d 1041 (1973).

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. "In the long haul, it won't work." 332 F. Supp. at 678.

This Court found as a fact in its opinion of July 20, 1973, 368 F. Supp. 1197, et seq., that within the IPS boundaries resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less. That finding has not been challenged by anyone. Therefore, in a school corporation in which the percentage of black pupils has now reached more than 42% over all, and with the Court of Appeals having ordered this Court

to take further steps to desegregate the same, 503 F. 2d 80, the Court is placed in an impossible situation unless the transfer for education of a substantial number of black IPS pupils to school corporations other than IPS is accomplished.

The Court therefore makes the following additional finding:

(c) The Fourteenth Amendment compels the Court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

The Court of Appeals has called the attention of this Court to the rule of law that "white flight" is not an acceptable reason for failing to dismantle a dual school system. 503 F. 2d 80, citing *United States* v. *Scotland Neck City Board of Education*, 407 U. S. 484, 491, 92 S. Ct. 2214, 2218, 33 L. Ed. 2d 75 (1970). However, it does not follow that this Court must ignore the probability of white flight in attempting to formulate guidelines for IPS to follow in accomplishing the final desegregation of its schools. In other words, as this Court sees it, white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action.

This approach requires the Court, once again, to review applicable statistics. "The Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy . . ." *North Carolina Bd. of Ed.* v. *Swann*, 402 U. S. 43, 91 S. Ct. 1284, 28 L. Ed. 586 2d (1971).

For the school year 1974-75, there were 77,732 pupils enrolled in IPS, excluding kindergarten and special education students. Of these 44,756, or 57.57%, were white and 32,976, or 42.43%, were black. Virtually all schools had an enrollment of at least 15% black pupils, and 19 elementary schools and one high school had enrollments in excess of 80% black. As

the Court understands the order of the Court of Appeals, this group of 20 schools must be further desegregated. As stated above, this Court has previously found that to require all schools to enroll about 42.43% black pupils would immediately accelerate white flight and unbalance the entire system beyond saving. The Court respectfully declines to stultify itself by giving any such direction.

The Metropolitan School Districts of Washington Township and Pike Township are integrating rather rapidly, as a result of demographic changes, so that Washington had a black percentage of approximately 15% and Pike a black percentage of approximately 12% for the past school year. These percentages seem likely to increase for the coming year. If the percentage of black students in the other suburban districts within Marion County were equivalent to that of Washington Township, approximately 9,525 black students would need to be transferred to such districts. The Court finds that the Fourteenth Amendment compels it to order IPS to transfer, and for the added defendant school corporations, other than Pike and Washington, to receive approximately such number of black students, over a period of time, in order to effect a plan of desegregation within IPS which is acceptable within the meaning of such amendment.

Transfers shall not include kindergarten nor special education students, and such students shall not be counted for the purpose of determining the number of transferees to each school corporation. Further, for the school year 1975-76, transfers will be limited to students in grades 1-9, inclusive, for a total of about 6,533 students, with the understanding that a student once transferred to a suburban school corporation will continue in such corporation until graduation from high school, unless the residence of such student is moved from IPS.

The number of students to be transferred to a particular school corporation shall be in such number as to cause the total enrollment of pupils in such school corporation, after the transfers have been accomplished, to be approximately 15% black. As an example, Beech Grove City Schools for the school year

1974-75 had an all white enrollment of 1,865 in grades 1-9, excluding special education. The 1,865 should be 85% of the school population after transfer; therefore 1% would be 21.9411, and 15% would be 15 x 21.9411 or 329. Approximately 329 black students would be transferred from IPS to Beech Grove in grades 1-9 for the coming school year. For the ensuing years, the original transferees would continue in the Beech Grove schools, and a new first grade group in an appropriate number would be transferred. Transfers by grade should be proportionate to the number of students enrolled per grade in the transferee schools for the past school year. Fortunately, the reports on classroom space filed by the added defendants reflects that, without exception, there is ample space available in which to house the transferees; also, IPS has ample transportation facilities available.

It is possible that transfers of black students to Washington Township should be made for education at the J. Everett Light Career Center; ruling on this point is reserved pending clarification as to certain statistical information in the record.

With regard to the present transfer of pupils, as above described and as will be more particularly set out in an accompanying order and judgment, the respective superintendents of the transferee school corporations involved, or their nominees, are directed to meet with the superintendent of IPS, or his nominees, forthwith in order to work out the exact names, numbers, and grades of pupils to be transferred. Reasonable deviations from exact statistical scheduling are anticipated, and may be agreed upon, subject to the approval of the Court. Disagreements, if any, shall be promptly referred to the Court for resolution. The transfers shall be effective, and transfer of pupils shall begin on the first day of the 1975-76 school year at each of the various transferee schools.

Once the transfer pupils have been identified, the defendant IPS is directed to submit to the Court a final plan for desegregation of the remaining schools within IPS. Alternate plans may

be submitted, in the discretion of IPS. Such plan or plans shall consider the high schools, as well as elementary schools. Kindergarten students and special education students need not be taken into account in computing black-white ratios in the various schools. Such plan or plans shall be submitted on or before October 15, 1975 and, if one be approved, it shall be put into effect at the beginning of the second semester of the 1975-76 school year, except as the Court may otherwise order.

As previously found, the location by HACI of all of its public housing facilities within IPS territory has had a major influence toward keeping black students confined within IPS, while at the same time keeping the suburban school systems virtually all white. Such conduct should and will be enjoined, so as to prohibit HACI from locating any additional public housing units within the boundaries of IPS. Furthermore, HACI should and will be enjoined from reopening Lockefield Gardens, a public housing project which is now vacant, to tenants other than the elderly.

The case for the intervening Buckley plaintiffs and their class was filed and has been presented by John O. Moss and John Preston Ward. The Court previously found them entitled to recover their reasonable attorneys fees and expenses, pursuant to 20 U. S. C. § 1617, but no fees have as yet been awarded, and the Court of Appeals has requested a further finding on the issue. 503 F. 2d 86. It is the Court's opinion that the Buckley plaintiffs should be regarded as the "prevailing parties," within the meaning of such statute, if the rulings of this Court relating to transfer of pupils become final, since they are the only parties who have contended for a remedy going beyond the IPS strait jacket.

Orders will be entered in accordance with this memorandum.

Dated this 1st day of August, 1975.

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judge.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

* * (Title Omitted in Printing) * *

JUDGMENT.

The Court having this day filed a memorandum of decision in the above entitled action (Indianapolis IV), containing various findings requiring orders and judgments, such orders and judgments are hereinafter set out.

Recognizing that some or all of the parties to this proceeding may wish to appeal the judgments entered herein by this Court as to them, and as a convenience to all parties, this Court will designate by separate subnumber that particular judgment directed against each particular defendant or defendants, in order that the parties appealing may properly designate in any notice of appeal filed herein that particular judgment or judgments so appealed. The defendant The Board of School Commissioners of the City of Indianapolis, Indiana will be referred to as "IPS."

a. IP 68-C-225A. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Decatur Township, Marion County, Indiana, 567 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

b. IP 68-C225B. It is ordered and adjudged that IPS is directed to transfer to The Franklin Township Community

School Corporation, Marion County, Indiana, 326 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

c. IP 68-C225C. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Lawrence Township, Marion County, Indiana, 930 negro students to be enrolled in grades 1-9 for the 1975-76 school years, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

d. IP 68-C-225D. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Perry Township, Marion County, Indiana, 1,555 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

e. IP 68-C-225E. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Warren Township, Marion County, Indiana, 1,206 negro students to be enrolled in grade 1-9 for the 1975-76 school year,

and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

f. IP 68-C-225F. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Wayne Township, Marion County, Indiana, 1,383 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

g. IP 68-C-225G. It is ordered and adjudged that IPS is directed to transfer to the School City of Beech Grove, Marion County, Indiana, 329 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

h. IP 68-C-225H. It is ordered and adjudged that IPS is directed to transfer to the School Town of Speedway, Marion County, Indiana, 237 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered

to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

i. IP 68-C-225I. It is ordered and adjudged that IPS prepare and file with the Court, on or before October 15, 1975, a plan, or alternative plans, for the final desegregation of its schools, taking into account the transfer of pupils ordered herein.

j. IP 68-C-225J. It is ordered and adjudged that The Housing Authority of the City of Indianapolis be, and it is permanently enjoined from constructing or in any manner acquiring any structure within the area served by IPS for the purpose of offering the same, or any parts or portions thereof, for rent as a family type public housing project.

k. IP 68-C-225K. It is ordered and adjudged that The Housing Authority of the City of Indianapolis be, and it is permanently enjoined from renovating its presently owned public housing project known as Lockefield Gardens for use as a family type public housing project, or to utilize the same, or any parts or portions thereof, for such purpose. Nothing herein contained shall be construed as enjoining the use of such structure for public housing for the elderly.

The Court retains continuing jurisdiction of this action, and the parties thereto, together with the right to modify or supplement any orders or judgments herein or heretofore made.

Dated this 1st day of August, 1975.

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judge.

UNITED STATES of America,

Plaintiff,

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein, Intervening Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,

Defendants,

OTIS R. BROWN, as Governor of the State of Indiana, et al.,

Added Defendants,

CITIZENS FOR QUALITY SCHOOLS, INC.,

Intervening Defendant,

COALITION FOR INTEGRATED EDUCATION,

Amicus Curiae,

HAMILTON SOUTHEASTERN SCHOOLS, HAMILTON COUNTY, INDIANA, ET AL.,

Additional Added Defendants.

No. IP 68-C-225.
UNITED STATES DISTRICT COURT,
S. D. Indiana,
Indianapolis Division.

July 20, 1973.

As Corrected Nov. 12, 1973.
Supplemental Opinion Dec. 6, 1973.

MEMORANDUM OF DECISION

DILLIN, District Judge.

I.

Introduction

This is a school desegregation action originally brought by the United States on May 31, 1968, pursuant to Section 407(a) and (b) of the Civil Rights Act of 1964, 42 U. S. C. § 2000c-6(a) and (b) against The Board of School Commissioners of Indianapolis, Indiana (hereinafter IPS), the members of the Board, and its appointed Superintendent of Schools.

On August 18, 1971, this Court found and concluded that IPS was guilty of unlawfully segregating the public schools within its boundaries. That decision was unanimously affirmed by the United States Court of Appeals for the Seventh Circuit and review was denied by the Supreme Court of the United States, without dissent. United States v. Board of Sch. Com'rs, Indianapolis, Ind., D. C., 332 F. Supp. 655, aff'd 7 Cir. 474 F. 2d 81, cert. den., 413 U. S. 920, 93 S. Ct. 3066, 37 L. Ed. 2d 1041 (1973). Such issue is res judicata.

In contemplating a remedy to vindicate the rights of Negro school children, this Court concluded that it could have ordered a massive "fruit basket" scrambling of students within IPS to achieve exact racial balancing. But the Court also concluded that in the long run, given the steadily rising percentage of Negro pupils within IPS, the racial composition of IPS would become nearly all Negro because of an acceleration in the departure of white families with children from IPS. In this connection the Court discussed the "tipping-point" factor—the point at which white exodus from a school unit is accelerated by increase of Negro students beyond a certain variable percent, and noted that the tipping-point/resegregation problem would become in-

significant if the boundaries of IPS were enlarged to include all of Marion County and a portion of its contiguous metropolitan region. The Court does not consider its conclusions in this area as res judicata.

In order to provide an appropriate adverse setting for further consideration of the legal and practical appropriateness of a metropolitan plan, the Court ordered the plaintiff United States to secure the joinder of necessary parties and seek further relief to determine the answers to certain questions posed by the Court.

On September 7, 1971, the United States (hereinafter the Government), pursuant to such order, moved to add as parties defendant all school corporations in Marion County, other than IPS. The motion was granted. However, the Government failed to assert any claims or seek any relief against such added defendants. A few days later the Buckley plaintiffs filed their petition to intervene in this action in their own right and as representatives of a class consisting of Negro school age children residing in Marion County, Indiana, who are required to attend segregated schools operated by IPS. The petitioners alleged that their interests and those of the class they represented were not being adequately protected by the original plaintiff, the United States, because the Government had failed to seek relief against the added school defendants. The Court granted the petition to intervene on September 14, 1971.

The Buckley intervening plaintiffs (hereinafter plaintiffs) eventually joined as added defendants Edgar D. Whitcomb (since succeeded by Otis R. Bowen), as Governor of the State of Indiana; Theodore Sendak, as Attorney General of Indiana; John J. Loughlin (since succeeded by Harold H. Negley), as Superintendent of Public Instruction of the State of Indiana; The Indiana State Board of Education, and nineteen school corporations within and without Marion County, Indiana (including the ten in-county corporations joined by the Government), as follows:

Marion County

The Metropolitan School District of Decatur Township (hereinafter Decatur)

The Franklin Township Community School Corporation (hereinafter Franklin)

The Metropolitan School District of Lawrence Township (hereinafter Lawrence)

The Metropolitan School District of Perry Township (hereinafter Perry)

The Metropolitan School District of Pike Township (hereinafter Pike)

The Metropolitan School District of Warren Township (hereinafter Warren)

The Metropolitan School District of Washington Township (hereinafter Washington)

The Metropolitan School District of Wayne Township (hereinafter Wayne)

School City of Beech Grove (hereinafter Beech Grove)

School Town of Speedway (hereinafter Speedway)

Boone County

Eagle-Union Community School Corporation (hereinafter Eagle)

Johnson County

Greenwood Community School Corporation (hereinafter Greenwood)

Hamilton County

Carmel-Clay Schools (hereinafter Carmel)

Hancock County

Greenfield Community School Corporation (hereinafter Greenfield)

Mt. Vernon Community School Corporation (hereinafter Mt. Vernon)

Hendricks County

Avon Community School Corporation (hereinafter Avon)

Brownsburg Community School Corporation (hereinafter Brownsburg)

Plainfield Community School Corporation (hereinafter Plainfield)

Morgan County

Mooresville Consolidated School Corporation (hereinafter Mooresville)

The geographical areas served by IPS and added defendants, with the exception of Greenfield, and Union Township of Eagle-Union, are reflected on Figure 1. Also represented thereon, for reasons which will hereafter appear, are territories or parts of territories served by certain other school corporations bordering on Marion County, namely, Clark-Pleasant Community School Corporation (Clark) and Center Grove Community School Corporation (Grove) of Johnson County; Delaware and Fall Creek Townships, a part of Hamilton Southeastern School Corporation of Hamilton County; Sugar Creek Township, a part of Southern Hancock County Community Schools (Hancock) of Hancock County; and Moral Township, a part of Northwestern Consolidated School Corporation of Shelby County (Northwestern) of Shelby County.

The intervening defendant Citizens of Indianapolis for Quality Schools, Inc., is a not-for-profit corporation whose members are parents of children in IPS. Its initial attempt to intervene in this action, in opposition to the original complaint of the Government, was denied by this Court, although the Court permitted it to attend the original trial, present argument, and file a brief *amicus curiae*. The ruling was appealed and affirmed. United States v. Board of Sch. Com'rs, Indianapolis, Ind., 466 F. 2d 573 (7 Cir. 1972). Subsequently, however, intervention was per-

mitted and intervening defendant participated fully in the most recent trial.

Coalition for Integrated Education is an unincorporated association of individuals favoring a metropolitan plan of school desegregation, which filed a petition for leave to appear *amicus curiae* for the purpose of presenting a desegregation plan, and a supplemental motion for leave to file a brief. The names of the members of the association are attached to the original petition. The motion for leave to file a brief as *amicus curiae* is granted. The Court reserves ruling on the petition to file a plan, as premature.

II.

The Issues

The issues of fact submitted for trial are as follows:

1. Whether or not desegregation of IPS within its present boundaries (sometimes referred to as an "Indianapolis Only Plan") can be accomplished as required by the equal protection clause of the Fourteenth Amendment in such a manner as to "work," within the meaning of Green v. County School Board, 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968): "The burden on a school board today is to come forward with a plan that promises realistically to work . . ."

2. Whether or not any of the added defendant officials of the State of Indiana, their predecessors in office, or the added defendant The Indiana State Board of Education have acted to promote segregation, or failed to carry out duties imposed upon them by law in such a manner as to promote segregation or inhibit desegregation within IPS.

3. Whether or not any of the added defendant school corporations have acted to promote segregation either within IPS or within their own boundaries.

The issues of law presented are as follows:

1. Whether or not the acts of *de jure* segregation heretofore found to have been practiced by IPS can be imputed to the

State of Indiana such that appropriate State officials or agencies may be directed to afford relief to vindicate the Fourteenth Amendment rights of plaintiff and their class.

2. Whether or not appropriate State officials or agencies have the power to direct reorganization of IPS with other school corporations, or to direct the transfer or exchange of IPS pupils to or with other school corporations in order to vindicate such rights.

3. Whether or not this Court may act in the manner just described to vindicate such rights if responsible officials or agencies of the State fail to do so within a reasonable time.

III.

Viability of an Indianapolis Only Plan

As stated above, the Court in its original opinion expressed some doubts as to whether or not a stable desegregation plan could be established within the confines of IPS, based upon the evidence adduced at that trial, which was all to the effect that when the percentage of Negro pupils in a given school approaches 40%, more or less, the exodus of white pupils from such a school becomes accelerated and irreversible, resulting in resegregation. However, additional evidence on this issue was adduced at the recent trial, and the Court bases its findings exclusively upon such latter evidence.

Having considered such evidence, the Court finds it to be a fact that when the percentage of Negro pupils in a given school approaches 25% to 30%, more or less, in the area served by IPS, the white exodus from such a school district becomes accelerated and continues, as demonstrated by Figure 2. All witnesses agreed that once a school becomes identifiably black, it never reverses to white, in the absence of redistricting. Therefore, progressions from white to black are irreversible once the critical percentage has been reached in the absence of interven-

tion through redistricting. Below the critical percentage, however, schools tend to remain stable, as demonstrated on Figure 3. With further reference to Figure 3, it will be noted that there is one elementary school within IPS which has remained stable over the past five years with a high degree of integration. This lone exception is School 86, which the Court judicially knows to be located in the Butler-Tarkington area of the city, mentioned in the testimony as an area in which the residents, black and white, have worked together for the past several years in a community relations program designed to maintain the stability of the neighborhood as an integrated community. The results achieved show dramatically that such a program can be made to work, but unfortunately the other statistics illustrate all too well that the Butler-Tarkington situation is the exception and not the rule.

The Court has no reason to find or believe that a crash IPS-wide community relations program, even if one were in progress (and none is), would achieve a system-wide stablization in time to preserve the entire system from becoming identified as racially black. The Court further finds that, given the present percentage of Negro pupils in the IPS system, which has risen to 41.1% since the previous trial, and the further fact that black enrollment in IPS will in the near future surpass white enrollments therein, as graphically illustrated on Figure 4, the right of plaintiffs and their class to attend schools which are not racially identifiable, as provided by the equal protection clause of the Fourteenth Amendment, cannot be accomplished within the present boundaries of IPS in a way that will work for any significant period of time.

In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of IPS on a 58.9%-41.1% basis, or some basis similar therto, so that no school could, for the time being, be racially identifiable as a black school. As a matter of fact, IPS announced rather dramatically during the recent trial that such

a plan would be put into effect for the coming school year, but rejected such plan at its recent meeting of July 16, 1973, as the Court knows judically. As demonstrated, however, such a plan, if put into effect, would have the effect of an immediate acceleration of white students into suburban white enclaves or private schools, so that IPS as a whole would predictably have a black majority within a matter of two or three years. This is not the Court's idea of a plan which "promises realistically to work."

On the other hand, the alternative to such a plan is to limit desegregation to figures which are statistically tolerable insofar as "white flight" is concerned, such as to provide that schools which now contain few or no Negro students accept additional numbers of the minority race, not to exceed perhaps 20% to 30%. Such a plan would, of course, have the effect of affording education in a desegregated setting to those minority race students attending schools in which they would make up the minority of 20% to 30%; but considering the total percentage of minority race students in the IPS system, it is equally obvious that such a plan would leave a large number of schools with a minority percentage in excess of 50%, which would not only make them racially identifiable schools, but would once again accelerate white flight from those particular schools.

On this key question as to whether a meaningful desegregation plan could be put into effect within the confines of IPS, the Court heard expert opinions from numerous witnesses called by each side. As usual, they disagreed. However, in the Court's opinion, a clear preponderance of the expert opinion was that no feasible plan could be devised. Those who testified to the contrary tended to qualify their opinions, and in some instances the facts presented by such witnesses simply did not support their conclusions.

For example, Dr. Mercer, a witness called by the Government, testified as to numerous facts having to do with desegration efforts in the State of California, and presented the City

of Riverside as a city where desegregation was apparently working well. However, it developed that the Riverside plan was put into effect voluntarily, accompanied by much community relation effort sponsored by the school and the local news media, and finally that the percentage of minority race students in the entire system was less than 25%. None of these facts have any relation to the situation in Indianapolis. On the other hand, the witness's own Figure 7, which is the last sheet of Government Exhibit 14, discloses the sharp and dramatic drop in "other-white" students in Inglewood, Pasadena, and San Francisco following public announcement that such schools would be required to desegregate, later followed by the filing of legal actions to accomplish such end. (The term "other-white" in California refers to those persons called "Anglos" in Denver and simply "whites" or "Caucasians" in Indianapolis. The California "other-white" is a white who does not have a Spanish surname.)

The testimony of another defense expert, Dr. Hooker, was completely demolished by cross-examination showing that in his published articles he had expressed views opposite to those given in this case, and Dr. Dodson testified that a metropolitan plan would be superior to one limited to IPS.

The solution, therefore, must be to look elsewhere, if this can be done within the law.

IV.

Responsibility of the State of Indiana.

In its previous opinion of August 18, 1971, the Court devoted several pages of its opinion to tracing the history of segregation within Indiana beginning 1800, demonstrating that the State, through its legislative, executive, and judicial branches had practiced all manner of discrimination against Negroes, not only in the field of education, but in housing and innumerable sectors of their social and economic life, as well as in the area of civil rights. 332 F. Supp. pp. 658-665. None of such

regrettable history, of which the Court then took judicial notice, has been refuted by any added defendant, with the exception of a quibble about the effect of certain school laws passed in 1961 and thereafter. The Court therefore incorporates such previous history into this opinion by reference, save to the extent that its discussion of Acts of the General Assembly of 1961 and thereafter will be reviewed further hereafter.

Before entering into a discussion as to the specific acts or omissions of State officials having a bearing on the problems of segregation and desegregation, it seems appropriate at this point to set out in detail the role of the State in public education in Indiana, touched upon rather briefly in this Court's previous opinion.

The original seaboard colonies were, of course, founded in the 17th and 18th Centuries, when the concept of public education was unheard of. As a result, such schools which existed therein in the early days were either church supported or were supported strictly by private funds. The relics of that system linger today in various states which evolved from the original colonies so that, for example, the decision in Bradley v. School Board of City of Richmond, Virginia, 462 F. 2d 1058 (4 Cir. 1972), (*"Richmond"*), based its decision reversing an order of the District Court for a metropolitan desegregation plan in Richmond and surrounding counties primarily on the basis that the operation of public schools within the different counties of the Commonwealth of Virginia is a matter of local option, and that, if the option be exercised, the power to operate, maintain and supervise the public schools in a given county is in the exclusive jurisdiction of the local school board and not the state.

However, following the successful conclusion of the Revolutionary War, it was foreseen by the Congress that an educated citizenry was vital to maintaining an enlightened self-government as provided for in the Constitution, and hence the education of all citizens became a concern of the Government. Thus

it was that when the Northwest Territory was formed out of lands formerly claimed by the Commonwealth of Virginia, the Northwest Ordinance of 1787 provided:

> "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. III.

The State of Indiana along with the states of Michigan, Ohio, Illinois, Wisconsin, etc., were, of course, later formed out of the Northwest Territory, and such states accordingly provided by their respective constitutions for the establishment of systems of public education. The original 1816 Constitution of Indiana, Sections 1 and 2, Article 9, paraphrased the above quoted language from the Northwest Ordinance and provided that it should be the duty of the General Assembly to provide by law for a general system of education, ascending in a regular graduation from township schools to a state university wherein tuition would be free, and equally open to all. Article 8, Section 1, of the present Constitution, adopted in 1851, carries forward the duty of the State in the following language:

> "Knowledge and learning, generally diffused throughout a community, being essenial to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."

[1-3] Under the 1851 Indiana Constitution, the common schools as a whole are made a state institution. Ratcliff v. Dick Johnson School Tp.; 204 Ind. 525, 185 N. E. 143 (1933); Ehle v. State, 191 Ind. 502, 133 N. E. 748 (1922); City of Lafayette v. Jenners, 10 Ind. 74 (1857). The State owns and maintains the common schools just as it does its public institutions of every kind. State v. Haworth, 122 Ind. 462, 23 N. E. 946 (1890). School corporations within the system only hold

title to such schools as trustees and the State has the right to change trustees by annexation at will. Board of School Com'rs v. Center Tp., 143 Ind. 391, 42 N. E. 808 (1896). The legislature may consolidate schools by resolution without notice to the voters or without any referendum or election. Fruit v. Metropolitan Sch. Dis. of Winchester, etc., 241 Ind. 621, 172 N. E. 2d 864 (1961).

[4, 5] It was the intention of the framers of the Constitution to place the common schools under the direct control and supervision of the State. Green Castle Township v. Black, 5 Ind. 557 (1854); State v. Eddington, 208 Ind. 160, 195 N. E. 92 (1935). The authority over the schools and school affairs resides exclusively within the dominion of the legislature and the school system is a centralized and not a localized form of school government. Gruber v. State, 196 Ind. 436, 148 N. E. 481 (1925); Jordan v. City of Logansport, 178 Ind. 629, 99 N. E. 1060 (1912); State v. Ogan, 159 Ind. 119, 63 N. E. 227 (1902); State v. Haworth, *supra;* State v. Eddington, *supra.*

[6] Under Article 8 of the Indiana Constitution, the power of the General Assembly to regulate the school system is practically unlimited. Kostanzer v. State, 205 Ind. 536, 187 N. E. 337 (1933). The employees of a school corporation undertake their duties not as officers of local units of self government but as officers of the public school system, which is a State institution. State v. Eddington, *supra.*

[7] The General Assembly has the power to prescribe the terms of the employment contracts to be executed by school corporations, Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 58 S. Ct. 443, 82 L. Ed. 685 (1937), and the power to provide a general system of licenses for those desiring to teach. Stone v. Fritts, 169 Ind. 361, 82 N. E. 792 (1907).

[8] While the State in acting directly to carry out its educational functions under Article 8, Section 1, is not forbidden to create and use local corporations for that purpose, it assumes

responsibility for the conduct of these corporations. Such corporations were and still are involuntary corporations established as part of the school system of Indiana and are but agents of the State for purposes of administering the State system of education. Indiana ex rel. Anderson v. Brand, *supra;* Campbell v. City of Indianapolis, 155 Ind. 186, 57 N. E. 920 (1900); Freel v. School City of Crawfordsville, 142 Ind. 27, 41 N. E. 312 (1895). Such corporations may only exercise the authority given them by the State, Ratcliff v. Dick Johnson School Tp., *supra;* Ehle v. State, *supra,* and the conduct and practices of these agent corporations must be considered acts of the State. Hummer v. School City of Hartford City, 124 Ind. App. 30, 112 N. E. 2d 891 (1953), overruled in part on other grounds, Flowers v. Bd. of Com'rs of County of Vanderburgh, 240 Ind. 668, 168 N. E. 2d 224 (1960).

Robinson v. Schneck, 102 Ind. 307, 1 N. E. 698 (1885), held that it was constitutional for the legislature to provide by general law for local school authorities to levy school taxes. Some of the general language in that case could suggest that local school corporations are to be treated as local units of self-government, as in Virginia. To clear up such an implication, the Supreme Court of Indiana in State v. Haworth, *supra,* made it clear that Robinson did not change the relationship of school corporations as agents of the State. The majority opinion specifically rejected the dissenting opinion's argument based on *Robinson* that the school corporations in the State are units of self-government in which local control of the schools is left with the people within such corporation. The majority held instead that the authority and control of schools and school affairs is vested exclusively in the General Assembly and that such affairs are intrinsically matters of State concern and not of a local jurisdiction. "In such matters, the State is a unit, and the legislature the source of power." To the same effect, see Ft. Wayne Community Schools v. State, 240 Ind. 57, 159 N. E. 2d 708 (1959).

To summarize in the words of the court in State v. Mutschler, 232 Ind. 580, 115 N. E. 2d 206 (1953):

> "The people of Indiana have translated into a fundamental constitutional postulate the belief that the general diffusion of knowledge and learning throughout a community is essential to the preservation of free government, and in harmony with this constitutional postulate the Constitution recognizes that the business of education is a governmental function *and makes public education a function of state government as distinguished from local government.* . . . It was evidently the intention of the framers of the Constitution to place the common schools under the direct control and supervision of the state, and make it a quasi-department of the state government, *a centralized and not a localized,* form of school government." (Emphasis added.)

The Indiana statutes on education are testimony to the constitutional and decisional history just discussed. The Indiana State Board of Education and its predecessor have been given great powers, and "It shall be the duty of the board to coordinate the work of the various commissions so as to bring about an effective and an (*sic*) unified school program and to make determinations in matters of jurisdiction between such commissions in accordance with the law, but all actions of the commissions within their respective jurisdictions shall be final." The "commissions" are on general education, textbook adoption, and teacher training and licensing. Indiana Code 1971, 20-1-1-1 & 20-1-1-2, Burns Ind. Ann. Stat. (hereinafter "Burns") § 28-101, 28-102.

Following said Section 20-1-1 of the Indiana Code of 1971, the first section having to do with schools, there follow some 349 solid pages of statutes enacted by the General Assembly regulating virtually every phase of school operation, printed single spaced, on unusually wide paper, in a type style reminiscent of that used in the exclusions section of an insurance policy. The annotated version of these laws occupies two complete volumes of Burns, comprising some 1,154 standard pages (but with an-

notations in small type), exclusive of indices and pocket parts. Burns, Vol. 6, parts 3 and 4. The administrative rules and regulations concerning education consume an additional 126 pages. Burns Ind. Adm. R. & Reg., Title 28. For obvious reasons, the Court will attempt no summary of this vast compendium, except to say generally that all phases of the operation of the public schools are regulated, in one way or another, by the State.

Of particular importance here, however, should be noted the statute, in effect from 1949 until 1972, which vested in the commission on geneal education of The Indiana State Board of Education the power and duty to regulate new school sites and buildings or any modifications of or additions to existing buildings, and established a division of schoolhouse planning under a director to be appointed by the state superintendent of public instruction with the approval of the governor. IC 1971, 20-1-2-1 to 20-1-2-6, Burns 28-301 to 28-306. Such law was repealed in 1972, but only because it was at such time replaced by a similar law. IC 1971, 20-1-1-6, as added 1972; Burns 28-109 (Pocket supp.).

Questions identical to those presented in this action have been considered by the Court of Appeals for the Sixth Circuit in Bradley et al. v. Milliken et al., 484 F. 2d 215 (1973). In upholding the trial court's determination that a metropolitan remedy would be appropriate to accomplish desegregation of the public schools of Detroit, it based its holding upon discriminatory practices on the part of both the Detroit school board and the State of Michigan found to be "significant, pervasive and causally related" to the segregation in the Detroit school system.

The discriminatory practices of the Detroit school board were, in general, acts of commission identical to those found to have occurred in Indianapolis, such as gerrymandering school attendance zones, making boundary changes which promoted segregation, providing optional attendance zones in "changing" areas, assigning teachers and staff so as to mirror the racial complexion of a school's student body, assigning students to elementary

and high schools according to the racial patterns of the feeder schools, selecting sites for new schools and building additions to existing schools in such a fashion as to separate the races, etc.

As between the four discriminatory practices charged to the State, the Sixth Circuit held:

> "The clearest example of direct State participation in encouraging the segregated condition of Detroit public schools, however, is that of school construction in Detroit and the surrounding suburban areas. Until 1962 the State Board of Education had direct statutory control over site planning for new school construction. During that time, as was pointed out above, the State approved school construction which fostered segregation throughout the Detroit Metropolitan area. . . . Since 1962 the State Board has continued to be involved in approval of school construction plans."

[9] In the case at hand the evidence shows that Arlington High School was opened in 1961 with a Negro enrollment of 0.23%, Northwest High School was opened in 1963 with a Negro enrollment of 0.0%, and John Marshall High School was opened in 1967 with a Negro enrollment of 0.3%. Inspection of maps in evidence discloses that Arlington is less than a mile from the extreme northeast corner of IPS, Marshall is squarely on the extreme east line of IPS, and Northwest slightly less than a mile from the extreme west line of IPS. This Court found in its previous opinion, and finds once again, that the placement of such schools constituted acts of *de jure* segregation on the part of IPS. The former holding has already been affirmed by the Seventh Circuit, 474 F. 2d at pp. 87, 88. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971).

Here, as in Michigan, the sites for the three high schools mentioned were necessarily approved by the appropriate agencies of defendants The Indiana State Board of Education and the Superintendent of Public Instruction. On the authority of *Bradley*, these were acts of *de jure* segregation on the part of officials

of the State. Similar examples could be pointed out with regard to site selection for construction and enlargement of elementary schools, but the foregoing examples are so obvious that there is no need to labor the point.

[10] Further, at all times since 1949, the Indiana statute forbidding racial segregation in educational opportunity has been in effect, IC 1971, 20-8-6-1 et seq., Burns 28-6101 et seq. and the mandate of the Supreme Court of the United States in Brown v. Board of Education of Topeka, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), has been the law since 1954. According to the evidence in this case, the officials of the State charged with oversight of the common schools have done almost literally nothing, and certainly next to nothing, to furnish leadership, guidance, and direction in this critical area. Even at this late date, the division of equal educational opportunity of the Indiana Department of Public Instruction, headed by the State Superintendent, consists of but four staff members and a secretary, to cover the entire State of Indiana, and has only been in existence for the past two years pursuant to a Federal grant. The Court finds that the failure of the State Superintendent and the Board of Education to act affirmatively in support of the law was an omission tending to inhibit desegregation.

V.

Acts of Added Defendant School Corporations

There was no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders. In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none, as illustrated on Figure 5. However, with respect to the added defend-

ants situate within Marion County, the evidence is that when the Marion County School Reorganization Committee, appointed pursuant to the Indiana School Reorganization Act of 1959, IC 1971, 20-4-1-2, Burns 28-3501 et seq., made its initial and unanimous recommendation that all of the school systems in Marion County be merged into one metropolitan system, the added Marion County defendants were unanimous in their opposition to the plan (which was, however, favored by IPS). Subsequently, and for the stated reason that in its opinion the metropolitan plan could not be adopted in view of the suburban opposition, the Reorganization Committee completely reversed itself and proposed a plan which, with minor exceptions having to do with areas within Center Township, froze all existing school corporations in Marion County according to their then existing 1961 boundaries.

Thus school reorganization in Marion County, rather than reorganizing anything except the name and method of school government as to certain added defendants, did nothing at all. By way of contrast, the evidence is that on a state-wide basis reorganizations pursuant to the Act of 1959 ultimately resulted in reducing the number of school corporations by approximately 50%, and created school corporations merging what had formerly been separate corporations in cities, towns, and their adjoining unincorporated areas, as well as merging what had formerly been separate township systems into consolidated systems. Some of the latter mergers extended across county lines, as reflected by defendant Wayne's Exhibit D. As to IPS, this farcical "reorganization" had the effect of making it technically a reorganized school corporation, and thus hampered its ability to be further reorganized without complying with all of the cumbersome procedures of the 1959 Act and other crippling legislation.

That the added defendants had a legal right to resist the recommendation of the School Reorganization Committee under existing law cannot be denied. At the same time, it is apparent

that confining IPS to its existing territory had the effect, which continues, of making it first difficult and now impossible to comply with the law requiring meaningful desegregation.

At this point the Court deems it appropriate to consider briefly the question as to why Figure 5 reflects such a remarkable absence of Negro citizens from the territories of the added defendants with the exception of Washington and Pike (those Negro citizens residing in Wayne are concentrated in that part of Wayne which is within IPS, according to school enrollment figures). Such absence is particularly glaring under the evidence, which reflects virtually no Negroes in Speedway, which has within its borders Detroit Diesel Allison Division of General Motors Corporation, the largest single employer of labor in Marion County; virtually none in Beech Grove, which houses the shops of the Penn Central Transportation Company; virtually none in Warren outside IPS, although Western Electric, situate in Warren Township, employs thousands of persons who busily make all of the telephones for American Telephone and Telegraph. Equally remarkable is the absence of Negroes from Lawrence which has the vast Army Finance Center located some two miles east of its high school. Either it must be concluded that Negroes, unlike other citizens, simply do not like to live near their places of employment (and all of the employers mentioned are equal opportunity employers), or there must be some other reason.

In *Richmond* the court said, among other things, "We think that the root causes of the concentration of blacks in the inner cities of America are simply not known . . ." This Court finds that statement incredible. Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in

housing which has prevented them from living any place else.

In the trial just concluded a witness called by the added defendants conceded that Negroes have been severely limited in their search for housing in the Indianapolis area to properties advertised in local newspapers as "for colored," and experts called by the Government testified that discrimination has been a root cause of the black central city phenomenon.

The Court sees no point in laboring the obvious. If racial discrimination did not exist in the United States, Indiana, and the Indianapolis metropolitan area, it would not be necessary to have laws against it. Yet the past ten years have brought forth a spate of such laws, local and national, preceded by reports of investigating commissions without end, all pointing up what every citizen knows—that discrimination is yet with us in a nation which daily pledges that it is ". . . one nation, under God, *indivisible*, with liberty and justice for *all*."

Such racial discrimination, which has been tolerated by the State at the least, and in some instances has been actively encouraged by the State, as set out in this Court's previous opinion, has had, as its end result, the creation of an artificial unrepresentative community, as pictured by the exhibits in this case. At the very least it may be said that Negroes have consistently been deprived of the privilege of living within the territory of the added defendants by reason of the customs and usages of the communities embraced within such boundaries, and of the State.

The foregoing should not be taken to mean that this action is one having to do with discrimination in housing, and this Court does not consider that a school desegregation action is one in which it is appropriate to attempt to remedy such discrimination, past or present. However, when it may be demonstrated that, as here, the discriminatory customs and usages mentioned have had a demonstrably causal relationship to segregation in the schools, such factor should not be casually swept under the table as in *Richmond*.

VI.

Conclusions of Law

The Court concludes, as a matter of law, as follows:

[11] 1. The acts of *de jure* segregation heretofore found to have been practiced by IPS can be, and are imputed to the State of Indiana.

2. The Superintendent of Public Instruction, The Indiana State Board of Education, and other responsible agents and agencies of the State of Indiana, and the State itself, have each practiced *de jure* segregation, both by commission and omission.

[12] 3. The General Assembly of the State of Indiana has the power, and it is its duty, to devise a metropolitan plan of common school education in the Indianapolis metropolitan area, which may be to direct the reorganization of IPS with other school corporations, in whole or in part, or to direct the transfer or exchange of IPS pupils to or with other school corporations, in such a manner as to vindicate the Fourteenth Amendment rights of plaintiffs and all Negro children presently within the jurisdiction of IPS to attend desegregated, nonracially identifiable schools.

4. If the General Assembly fails to act in the manner described within a reasonable time, this Court has the power and the duty to devise its own plan, and to order the defendant and the added defendant school corporations, State Superintendent of Public Instruction, and The Indiana State Board of Education to implement the same.

[13] In short, paraphrasing the holding of the Sixth Circuit in Bradley et al. v. Milliken et al., *supra,* this Court holds that the record establishes that the State has committed *de jure* acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. There can be little doubt that a federal court has both the power and the duty to effect a feasible desegregation

plan. Indeed, such is the essence of *Brown II*. Brown v. Board of Education, 349 U. S. 294, 300-301, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between IPS and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines. United States v. Scotland Neck Board of Education, 407 U. S. 484, 489, 92 S. Ct. 2214, 33 L. Ed. 2d 75 (1972); Wright v. City of Emporia, 407 U. S. 451, 463, 92 S. Ct. 2196, 33 L. Ed. 2d 51 (1972); United States v. State of Texas, 447 F. 2d 441, 443-444 (5 Cir. 1971); Haney v. County Board of Education of Sevier County, 429 F. 2d 364, 368 (8 Cir. 1970). See also Davis v. Board of School Commissioners, 402 U. S. 33, 36-38, 91 S. Ct. 1289, 28 L. Ed. 2d 577 (1971).

There exists, however, an even more compelling basis for this Court's crossing artificial boundary lines to cure the State's constitutional violations. The instant case calls up haunting memories of the now long overruled and discredited "separate but equal doctrine" of Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). If we hold that school district boundaries are absolute barriers to an IPS school desegregation plan, we would be opening a way to nullify Brown v. Board of Education which overruled *Plessy, supra.*

VII.

The Area of a Viable Metropolitan Plan

In considering a metropolitan plan, it is apparent that, to name a few factors, the area should be reasonably compact in size in relation to is center, should not be separated by massive natural obstacles, and otherwise should be adaptable to the

reasonably speedy transportation of school children. Also, it would seem only reasonable to examine whether or not the area to be considered has significant common interests with the area hub. The Court now examines the situation with regard to the area depicted on Figure 1.

In the first place, the Court knows judicially that the entire area consists of virtually flat land, gently sloping from the northeast to the southwest with a fall of approximately 150 to 200 feet in approximately 35 miles. The area contains no natural barriers of any consequence; two fairly sizeable reservoirs, Giest and Eagle Creek, are located northeast and northwest, respectively, and pose no obstacle to movement of people to or from the center of the area, while White River is little larger than a robust creek, and is crossed by numerous bridges. With a very few exceptions, such as added defendants in their roles as employers, all industrial plants and other major places of employment within the area are concentrated either within the boundaries of IPS or are within a few city blocks of such boundaries in Wayne and Warren Townships and the towns of Speedway and Beech Grove. Indeed, as the evidence discloses, many of the added defendant school corporations are the largest single employers of labor within their respective borders!

The employment situation is represented on Figure 6, which shows graphically that, with the exception of the City of Greenfield (not shown on Figure 1), more than half (in most cases more than 60%) of the residents of each unit shown on Figure 1 are employed in Marion County—as a practical matter in IPS, or within a few city blocks thereof. If the rather substantial number of workers who did not list their place of employment are distributed in proportion to those who did, it is apparent that the true percentage of Marion County workers in the area is even higher than as indicated.

The employment picture just described results in huge flows of traffic from the "bedroom" townships primarily to Center, Warren and Wayne Townships of Marion County each week-

day morning, and back again each evening. In order to accommodate this flow of traffic, the Indianapolis area, with a huge assist from the Federal government, is blessed with an extraordinarily efficient highway network. The central area is completely looped by Interstate Highway I-465, a six-lane, divided, limited access highway, typical of such highways in the Interstate System. The loop varies in its distance from Monument Circle, the hub of downtown Indianapolis, from as little as 4.50 miles, due south, to as much as 11.50 miles to the northwest, averaging perhaps six or seven miles in distance from such central reference point. Additionally there are no less than seven additional legs of Interstate highways branching off of I-465, and in some instances, coming inside the I-465 loop. Specifically, I-74 runs northwest and southeast from I-465, I-69 runs northeast from I-465, I-70 runs southwest and due east from I-465 (with construction in progress to link up both legs through the center of this city), and I-65 runs northwest and southeast from I-465 (I-65 will also link both of its legs through the center of the city, and the north leg is already open from I-465 to 11th and Meridian Streets, in downtown Indianapolis).

In addition, there are many other multilane highways leading into, out of, and through the central area, many of which are divided, such as S. R. 67 to the southwest and northeast, U. S. 40 due east and west, S. R. 431 and U. S. 31, each running due north and south to southeast, S. R. 37 south and northeast, and S. R. 100, running along the north and east sides, just inside I-465. Such routes, and other main highways, are illustrated on Figure 7.

Virtually all points of interest for cultural, sports, and higher educational activities are located within IPS. For example, as the Court knows judicially, Butler University, Marian College, Indiana Central College, the Indianapolis campus of Indiana and Purdue Universities are so located, as are the Indianapolis Zoo, the Children's Museum, the Indiana State Fairgrounds, the Indiana Capitol and office buildings, all major federal offices,

Clowes Hall (an outstanding theater for the performing arts), the Indianapolis Sports Arena, the Indianapolis Convention Center, etc. The Indianapolis Art Museum directly adjoins an IPS boundary, as does the Indianapolis Motor Speedway (located in Speedway).

Just as the working parents of the suburbs drive back and forth to work each day, so are most suburban children bused to and from school. As shown on Figure 8, out of 114,696 students in suburban schools, 90,266 or 78.7% are bused. The State reimburses each school corporation a portion of the cost of busing each child. (Also, it should be noted, the State reimburses each added defendant, except Speedway, a substantial portion of its costs of operation, according to a complicated formula.) These bus routes are extremely time consuming, as anyone knows who has the misfortune to follow a bus down the highway, since the custom in the suburban areas is to pick up the children on virtually an individual basis. However, assuming that children walk to a central school or other convenient point, such as most IPS pupils do, and are then transported non-stop to their designated school of attendance via the major traffic arteries (during which period of transportation they would be going opposite to the flow of commuter traffic, and hence not impeded by it) the Court is of the opinion that—given logical and most convenient assignments—virtually all students could be delivered in thirty minutes. Thirty or even forty-five minutes is not an unreasonable time, and altogether comparable to that required for such transportation elsewhere in Indiana.

As shown in Figure 4, previously referred to, the white pupil enrollment within IPS is sharply falling, while that of Negro pupils is rising. On the other hand, the population of each area in which added defendants operate their schools, and the areas of non-defendant school districts adjoining Marion County are rapidly rising in population, virtually all white. These changes are illustrated in Figures 9, 10, and 11.

It was argued by added defendants that the Negro birth rate and in-migration had declined to the point where further increase in the black school population would not occur. This not only begs the question of white migration to the suburbs, but cannot be demonstrated statistically, as shown by Figure 12, reflecting that estimated black enrollments in grade 1 in 1973 virtually equal black births in Indianapolis in 1967—an obvious statistical improbability without continued in-migration.

With regard to the defendant Greenfield, Union Township of Eagle-Union and certain omitted townships of the non-defendants Hamilton Southeastern, Southern Hancock, and Northwestern, the Court is of the opinion that the distances involved are impractical, and therefore makes no recommendation that they be included in a metropolitan plan. The Court does recommend that all other added defendants be included in the metropolitan plan, as well as Eagle-Union to the extent of Eagle Township.

The Court observes that, on the basis of the applicable figures, the General Assembly may also wish to add the non-defendants Center Grove, Clark-Pleasant, Southern Hancock, Hamilton Southeastern to the extent of Delaware and Fall Creek Townships, and Northwestern to the extent of Moral Township to the plan. Its ability to do so is undoubted. State v. Mutschler, *supra*. However, the Court can make no finding or recommendation with respect to these corporations until such time as they have had their day in court. Intervening plaintiffs are directed to interplead such corporations as additional added defendants forthwith.

VIII.

Constitutionality of Certain Indiana Statutes

Questions posed by the Court in its previous opinion inquired as to the constitutionality of certain Indiana statutes, specifically Chapter 186 of the Acts of 1961, IC 1971, 20-3-14-1, 20-3-14-10, Burns 28-2338, 28-2346, 28-2347 (1968 Cum.

Supp.); Chapter 52 of the Acts of 1969, IC 1971, 20-3-14-9 Burns 28-2346a (1970 Cum. Supp.), and Chapter 173 of the Acts of 1969, IC 1971, 18-4-1-1 to 18-4-5-4, Burns 48-9101 et seq.

In the opinion of the Court such statutes, along with the application or the misapplication of the School Reorganization Act of 1959, certainly placed IPS in a strait jacket. However, in view of the Court's other findings and conclusions, it is unnecessary to consider the question of unconstitutionality.

IX.

Interim Relief

[14] The Court is of the opinion that it would be without jurisdiction to order the exchange of pupils between IPS and added defendants at this time. It is Negro children of IPS and not suburban children who are being deprived of a constitutional right, and so long as the various school corporations remain separate the Court believes that it would have no basis to direct that a suburban child be transported out of its own school corporation. However, the Court knows of no reason why added defendants should not immediately accept a reasonable number of Negro children from IPS on a transfer basis, effective as of the beginning of the 1973-74 school year, and it is so ordered. In this connection, the evidence shows that virtually all added defendants routinely exchange or transfer pupils for various educational purposes. The Court can think of no more important form of special education for a Negro child than going to school in an integrated environment.

As shown by the evidence, Negro pupils constituted 39.5% of the 1972-73 enrollment of IPS, but constituted but 24.3% of the total enrollment of Marion County and 19.5% of the total enrollment in the Figure 1 area for the same period. Although a perfect racial balance in each school is not required by law and will not be ordered, the General Assembly will

presumably give careful consideration to these relative percentages. Also, the General Assembly should keep in mind that "tokenism" will not, in the Court's opinion, meet constitutional requirements.

With respect to IPS itself, it is not true that children of both races may not be transported or otherwise exchanged. As repeatedly pointed out by this and all other Federal courts in the land, following, as we must, the pronouncements of the Supreme Court of the United States, there is nothing sacred about the attendance zones within a school corporation, no constitutional right in a student to attend a particular school (except that a child of a minority race has a right to attend a desegregated school), and so IPS must immediately take steps to reduce the amount of segregation in its system. However, final relief cannot be had until the General Assembly acts, or this Court is compelled to devise its own plan because of default on the part of the General Assembly.

The Court has given consideration to the average daily attendance in the various schools of added defendants, as shown by the evidence, and is pleased to note that such averages are all well below that permitted by State authorities. If each school accepted transfer of 5% of its present enrollment, this would amount to an average of little more than one child per classroom, which is certainly a reasonable figure and one well below what the Court believes a proper metropolitan plan should accomplish. However, exceptions should be noted in two instances—that of Pike and Washington.

Washington already has a Negro percentage of 11.29% and Pike a percentage of 8.17%. Washington has an exemplary record of fair treatment of its minority students, and has also aggressively added minority race members to its faculty and staff. Primarily, however, because of their present minority enrollments, transfers to these added defendants should be limited.

It is therefore considered and ordered that, as interim measures, the following be accomplished prior to the beginning of the 1973-74 school year:

1. IPS is directed to transfer to each of the added defendants, except Washington and Pike, a number of Negro students equal to 5% of the total 1972-73 enrollment of each transferee school, respectively, to transfer to Washington 1% of its 1972-73 white enrollment, and to Pike 2% of its white enrollment for the same school year. Provided, however, that the number of students who attended school in Union Township of Boone County for such school year shall be deducted from the Eagle-Union total before applying said percentage.

2. IPS shall not be required to transfer kindergarten students, nor students commencing their twelfth year. The numbers of students in such grades enrolled in added defendants' schools for the year 1972-73 shall, however, be counted in arriving at the total to which the applicable percentage figure shall be applied.

3. Each of the added defendants is directed to accept such transferee students and enroll them accordingly.

4. The cost of transportation and tuition of such students shall be the obligation of IPS; provided, that IPS shall be entitled to a credit for any excess State reimbursement paid to a transferee corporation if any, as a result of the presence of transferred pupils.

5. If any teachers presently employed by IPS are rendered surplus as a result of this order, and additional teachers are needed by any added defendant as a result hereof, first consideration shall be given by such added defendant to employing a qualified IPS teacher.

6. The added defendants and IPS, through their respective boards, superintendents, or other designated agents are ordered to meet together forthwith, and to continue to meet until the various logistical problems made necessary by this order are resolved. Unresolved issues, if any, may be referred to the Court for ruling.

7. IPS is directed to rearrange the enrollment patterns in its elementary schools, effective at the beginning of the 1973-

74 school year, such that each school will have a minimum Negro enrollment of in the area of 15%. The pairing or clustering of schools, and realignment of school assignment zones will be employed. Pairing or clustering should be of schools in close proximity, if possible. Such action will result merely in an expansion of the neighborhood or community school concept, and reduce the necessity of busing. If after utilizing such procedures, certain schools do not meet the required numbers, pairing or clustering of schools in non-contiguous zones will be resorted to. *Swann,* 402 U. S. at 28, 91 S. Ct. 1267.

8. If transportation of pupils is required to accomplish the result just ordered, IPS and defendant officials of IPS are instructed that transportation of students of the two races shall be generally proportionate. However, nothing herein should be construed as preventing IPS from closing obsolete, heavily black schools if no longer needed for student housing, and in such event it will necessarily follow, in some cases, that a disproportionate number of black students will require transportation.

9. IPS is further directed to rearrange the feeder patterns of its high schools, so as to secure enrollment of Negro students in each school more nearly approaching their numbers in the system. Specifically, the number of such students in Thomas C. Howe High School should be increased to the area of 25%, and that at Shortridge reduced to not more than the area of 60%. In making transfers of high school pupils to added defendants, the Board should also keep in mind that Negro percentages at Arlington and Broad Ripple are already somewhat past the 40% level, and should be reduced, if possible.

10. All defendants who have not done so are directed to institute appropriate in-service training courses for their respective faculties and staff, and otherwise to orient their thinking and those of their pupils toward alleviating the problems of segregation.

In this last connection, the Court was pleased to learn from the evidence of the recognition given to Negro students by their

fellow white students in the few suburban schools which they attend, and of the honors, both scholastic and otherwise, which such Negro students have earned in such schools. These facts, put in evidence by added defendants, indicate to the Court that children are basically inclined towards judging each other on the merits and that, if permitted to follow their own decent instincts, will accept each other on the basis of equality, without racial hatred. There just may be a message in this evidence for the adult world.

11. John O. Moss and John Preston Ward, attorneys for the intervening plaintiffs and their class, are entitled to recover their reasonable attorneys fees and expenses, and intervening plaintiffs are entitled to recover their costs. Such attorneys are directed to submit their respective petitions for fees and allowances. Apportionment of the cost of same is reserved.

12. The Court retains continuing jurisdiction herein.

All of the above is considered ordered, and adjudged this 20th day of July, 1973.

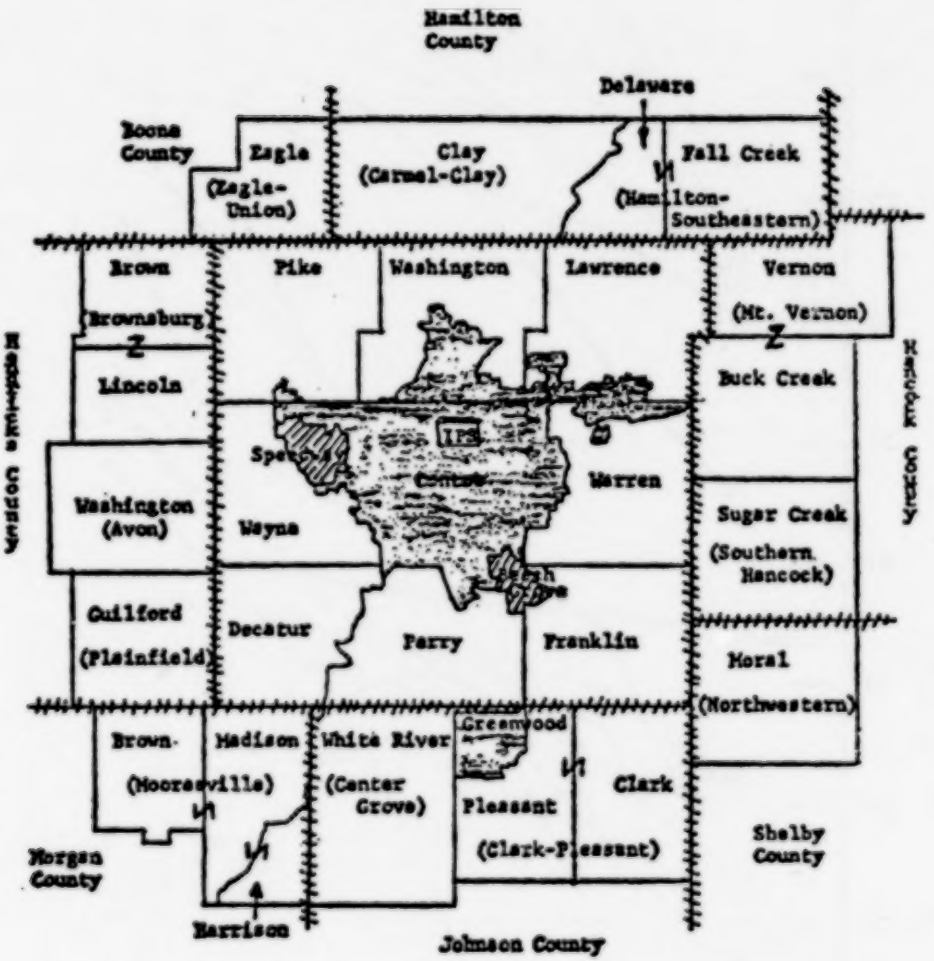
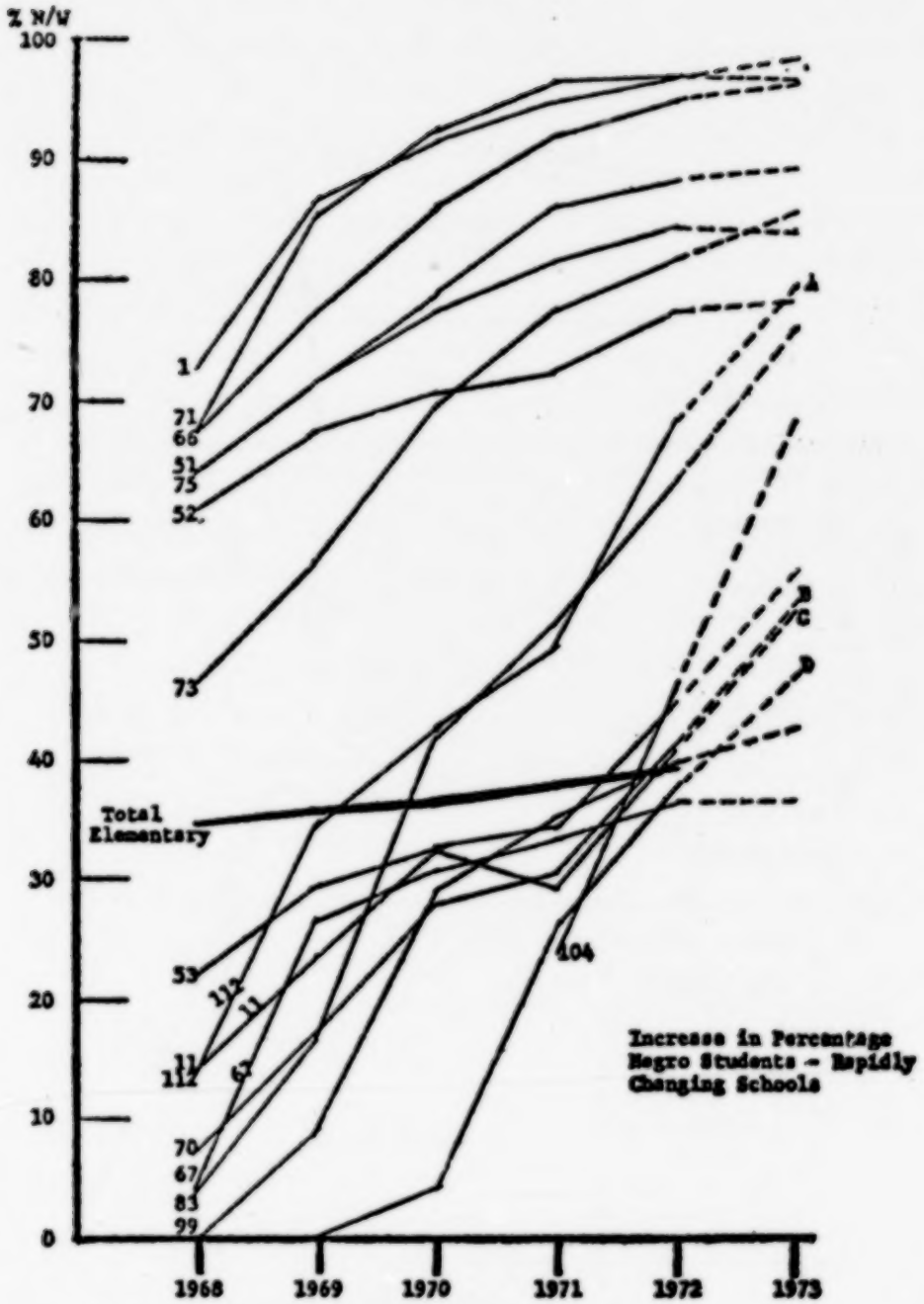

Hamilton County
Delaware
Boone County
Eagle
(Eagle-Union)
Clay
(Carmel-Clay)
Fall Creek
(Hamilton-Southeastern)
Brown
Pike
Washington
Lawrence
Vernon
(Mt. Vernon)
Brownsburg
Hendricks County
Lincoln
Buck Creek
Marion County
IPS
Center
Warren
Washington
(Avon)
Wayne
Sugar Creek
(Southern Hancock)
Guilford
(Plainfield)
Decatur
Perry
Franklin
Moral
(Northwestern)
Brown
Madison
White River
Greenwood
(Mooresville)
(Center Grove)
Pleasant
(Clark-Pleasant)
Clark
Shelby County
Morgan County
Harrison
Johnson County
County Boundary
Scale
0 1 2 3 4 5
(miles)

Fig. 1



Key: A Public Housing Unit Opened 6/69
B Some Blacks Transferred Out, Whites In 1971
C Some Blacks Transferred Out, Whites In 1971
D Two Public Housing Units Opened 12/70

Fig. 2

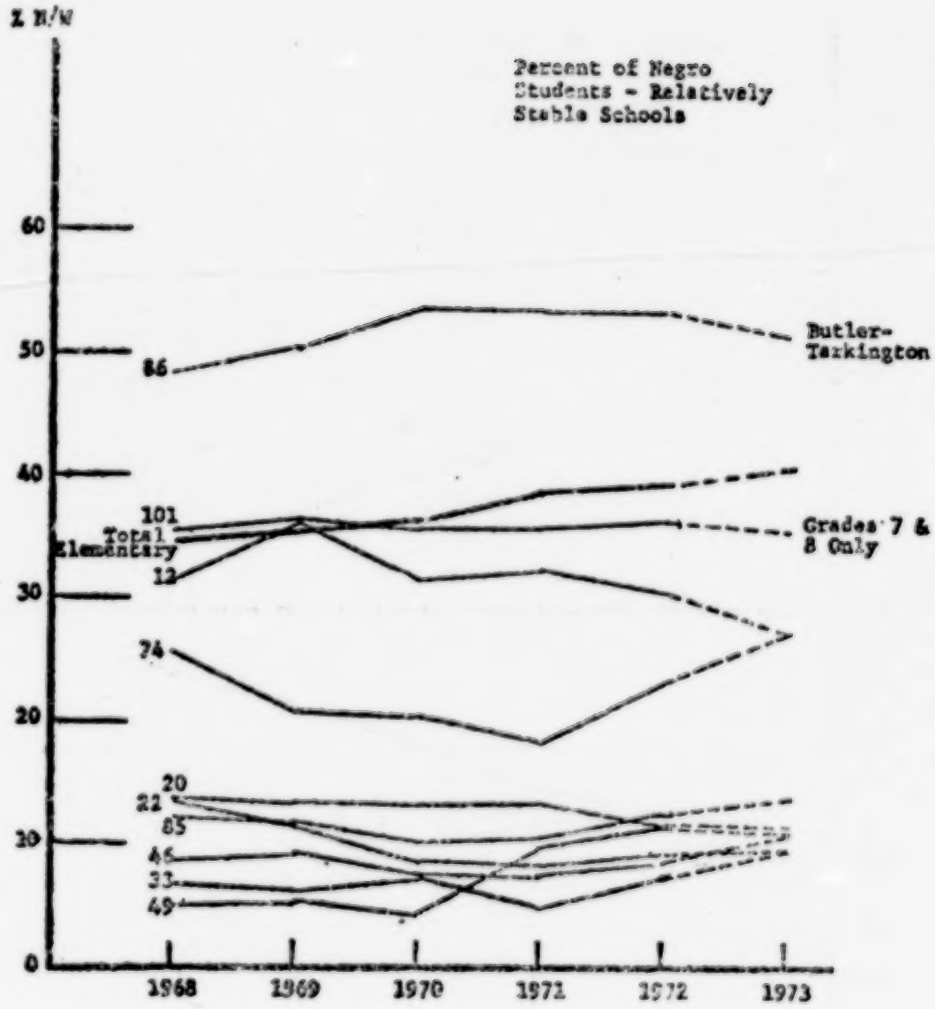

% N/W
Percent of Negro Students - Relatively Stable Schools
60
50
40
30
20
10
0
86
Butler-Tarkington
101
Total Elementary
12
Grades 7 & 8 Only
74
20
22
85
46
33
49
1968
1969
1970
1971
1972
1973

Fig. 3

Per Cent White - Non-White Students - IPS

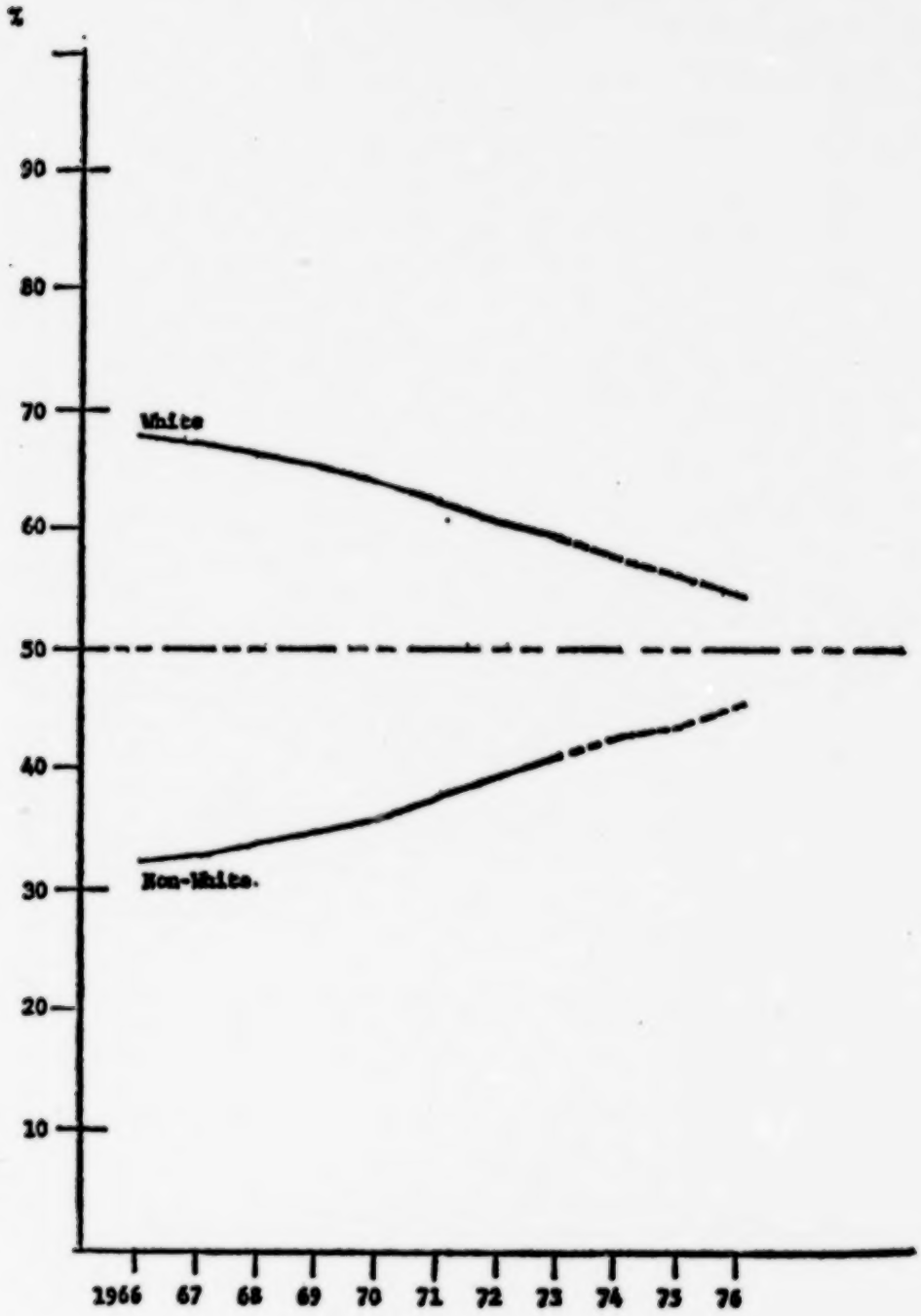
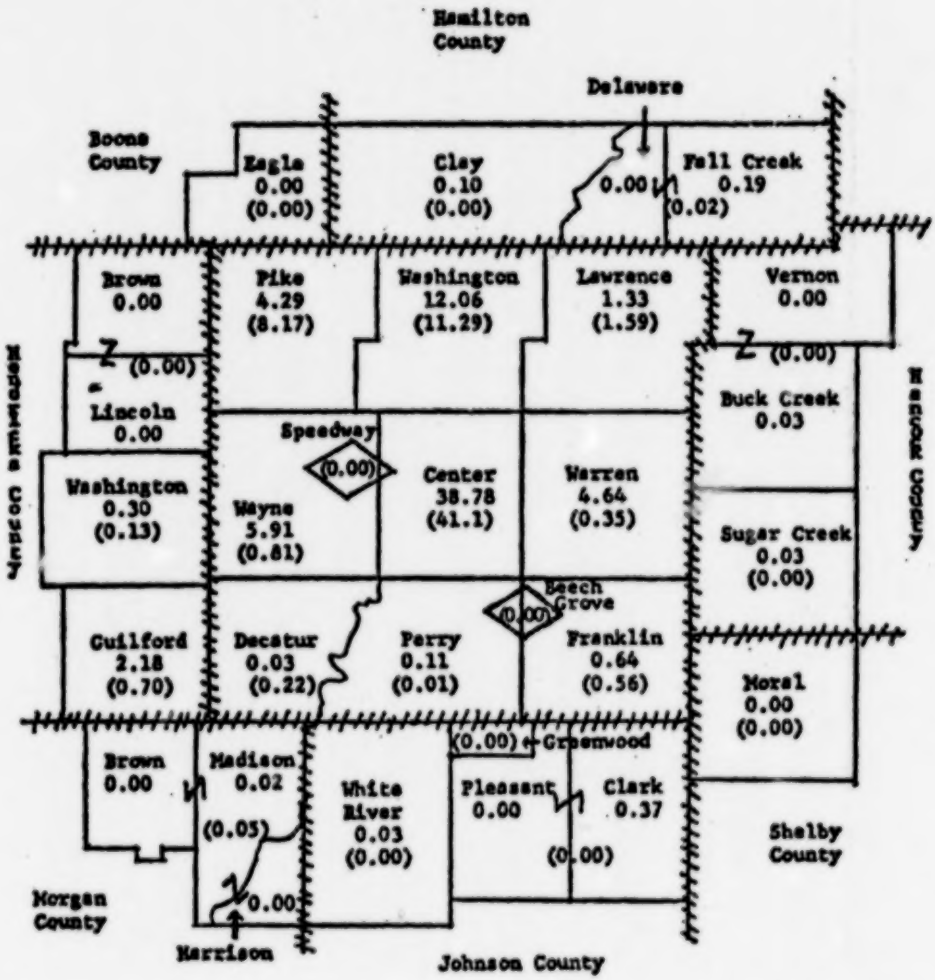


Fig. 4

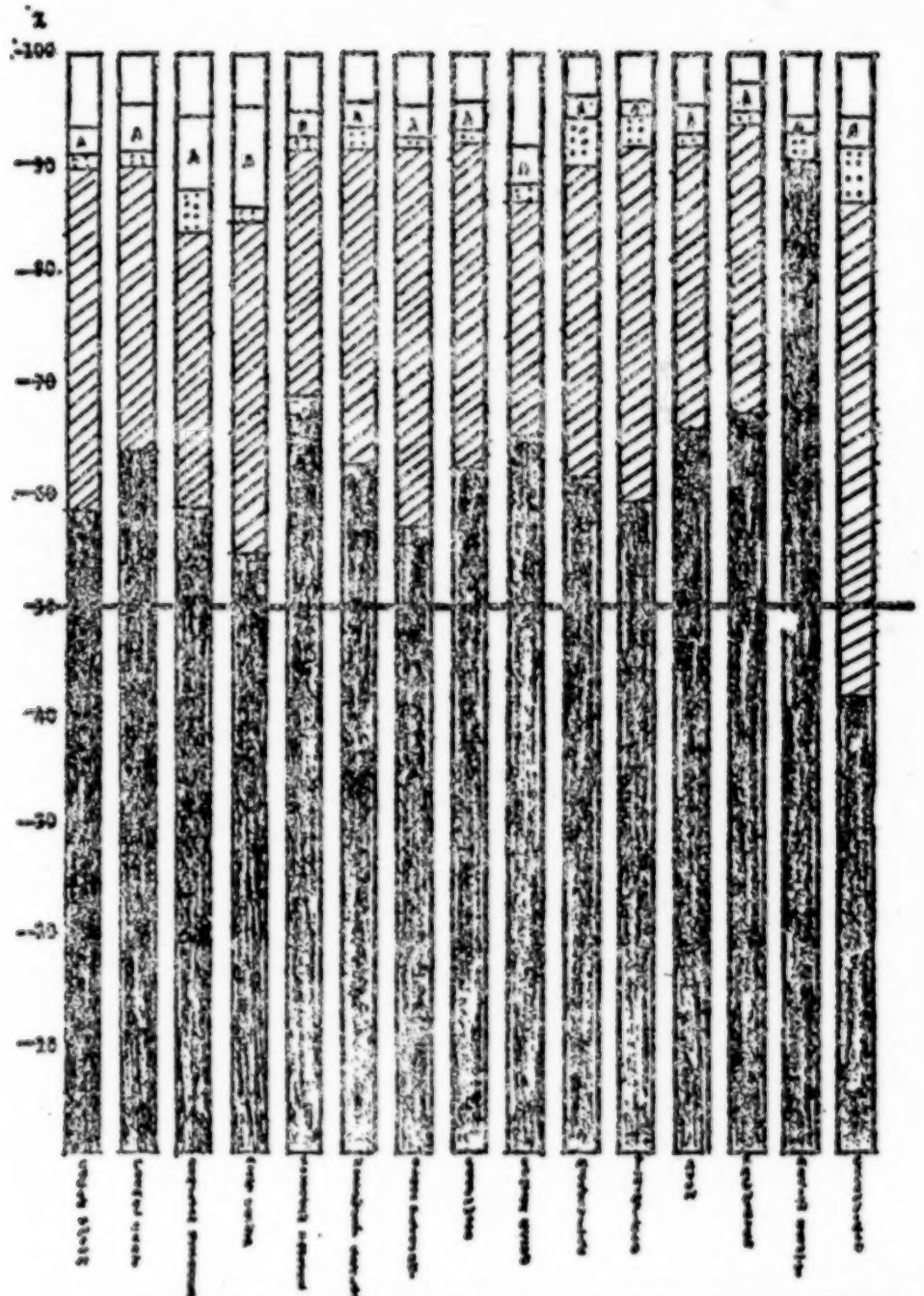
Percent of Negro Residents in Marion County and Surrounding Townships
(Percent of Negro Students in School Systems)



County Boundary

Scale 0 1 2 3 4 5 (miles)

Fig. 5



Place of work of all workers living in Marion County, School Districts surrounding Marion County, and City of Greenfield. (Source: Plaintiffs' Ex. 37; Carmel-Clay Ex. 77)

Fig. 6

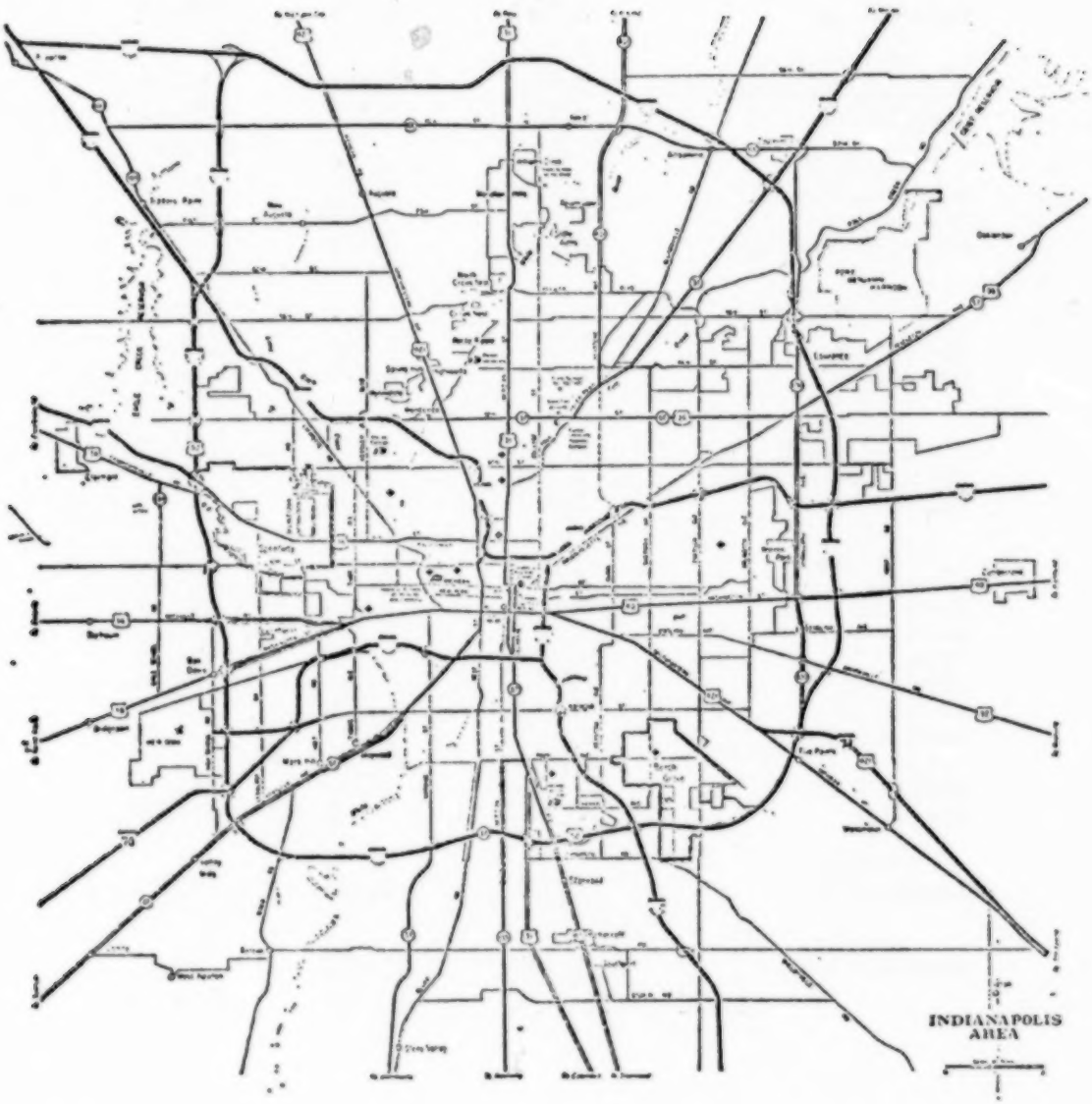


Fig. 7

Pupils Bused, 1971-72
(Other than Indianapolis)

	Pupils	Pupils Bused	% Bused
Boone			
Eagle-Union	1,738	1,293	74.39
Hamilton			
Hamilton-Southeastern	1,722	1,593	92.50
Carmel-Clay	6,196	4,115	66.41
Hancock			
Southern Hancock	1,895	1,722	90.87
Mt. Vernon	1,826	1,483	81.21
Greenfield-Central	4,156	1,733	41.69
Hendricks			
Avon	2,129	2,045	96.05
Plainfield	3,731	1,714	45.93
Brownsburg	3,333	2,198	65.94
Johnson			
Clark-Pleasant	2,738	2,533	92.51
Center Grove	2,920	2,754	94.31
Greenwood	3,383	2,766	81.76
Marion			
Decatur	4,706	4,304	91.45
Franklin	2,646	2,378	89.47
Lawrence	9,625	7,806	81.10
Perry	13,254	10,143	76.52
Pike	3,199	2,999	93.74
Warren	10,202	9,255	90.71
Washington	15,675	12,115	77.28
Wayne	12,652	11,175	88.51
Beech Grove	2,818	1,757	62.34
Speedway	2,482	0	0.00
Morgan			
Mooresville	3,959	2,286	57.74
Shelby			
Northwestern	1,867	1,832	98.12
Total	114,696	90,266	78.70%

Source: Reports A and F of
Plaintiffs' Exhibit 10

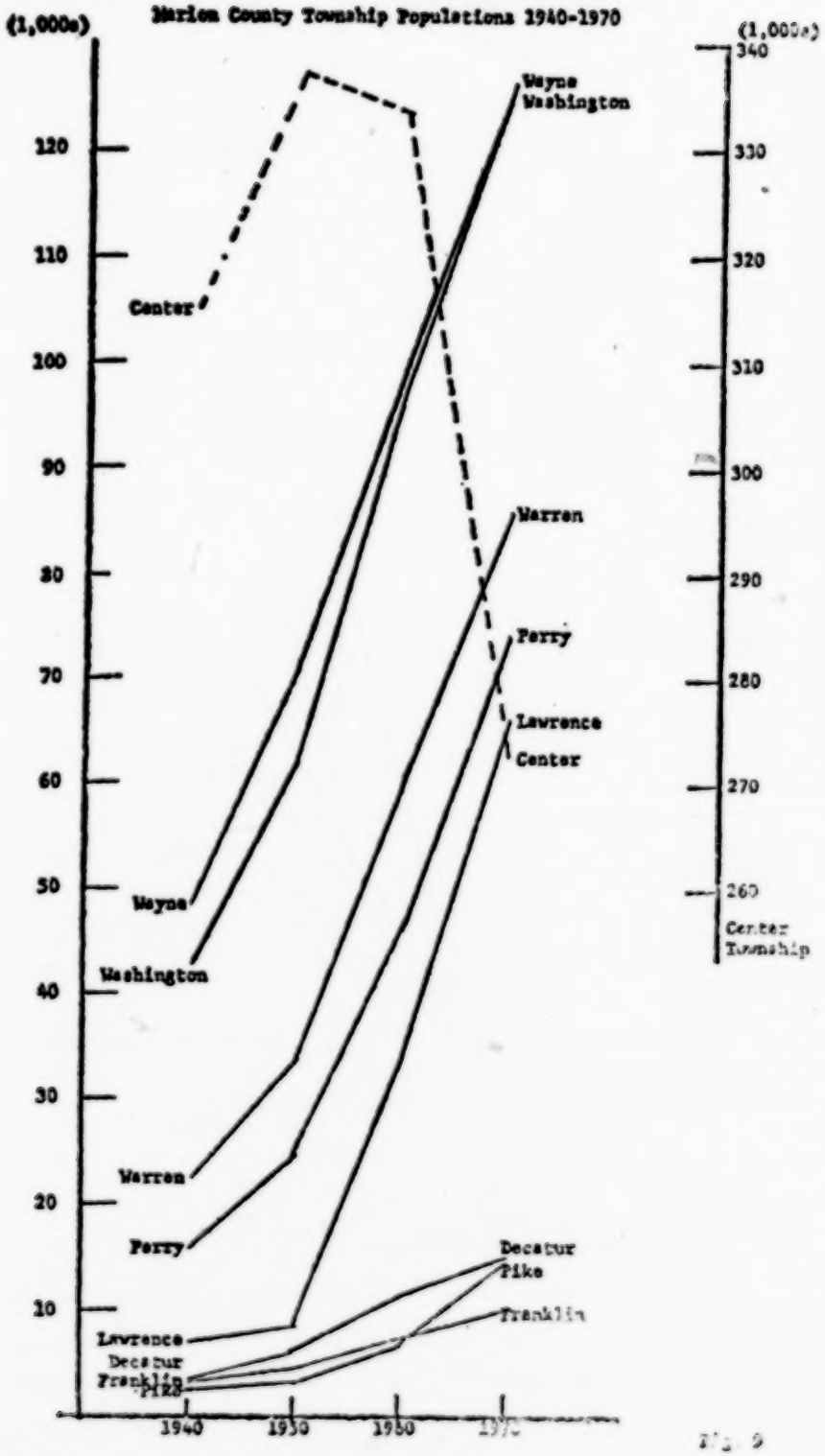

Marion County Township Populations 1940-1970
(1,000s)
120
110
100
90
80
70
60
50
40
30
20
10
Center
Wayne
Washington
Warren
Perry
Lawrence
Decatur
Pike
Franklin
1940
1950
(1,000s)
340
330
320
310
300
290
280
270
260
Center Township

Fig. 9

Percent Increase in Population: Marion County Townships

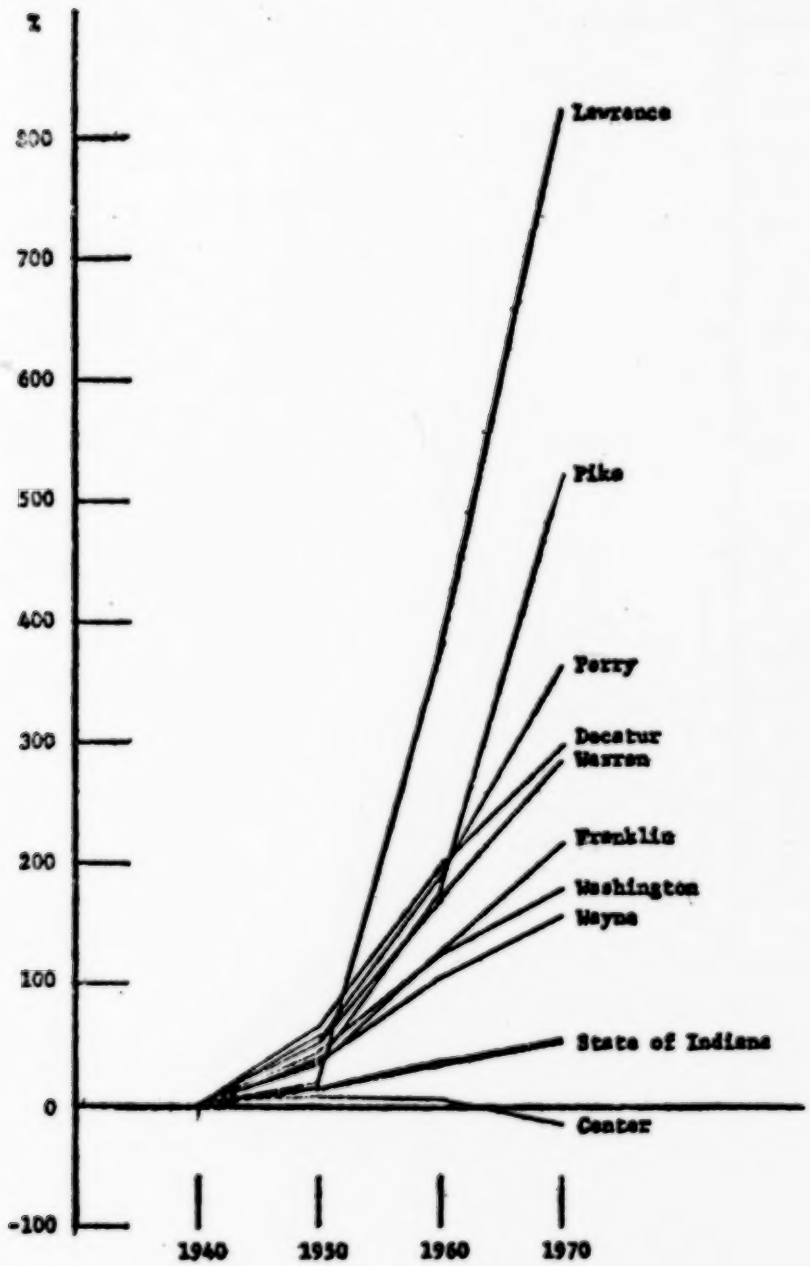
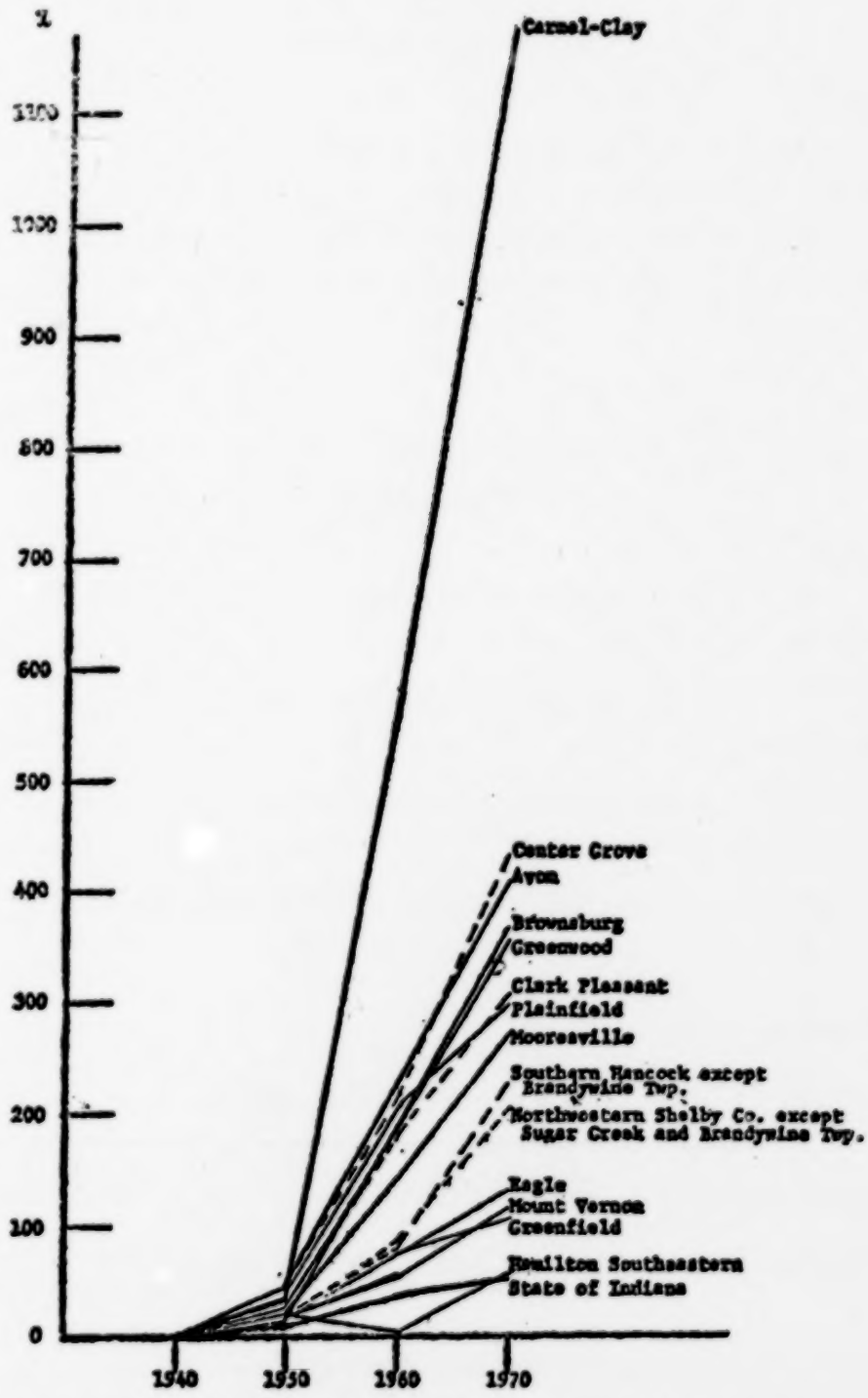


Fig. 10



Percent Increase in Population: Outside Marion County School Districts

Fig. 11

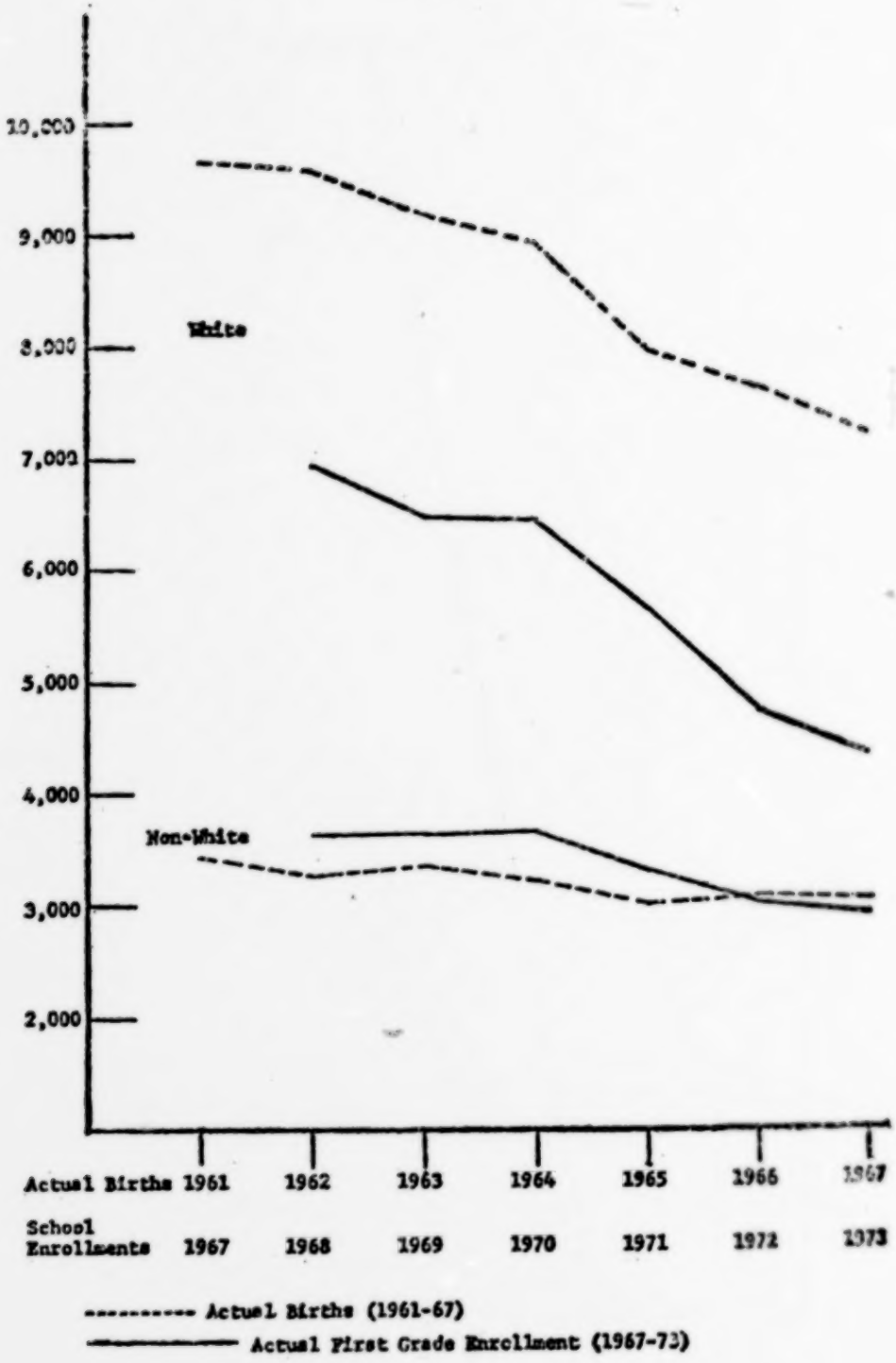

10,000
9,000
8,000
7,000
6,000
5,000
4,000
3,000
2,000
White
Non-White
Actual Births 1961 1962 1963 1964 1965 1966 1967
School Enrollments 1967 1968 1969 1970 1971 1972 1973
Actual Births (1961-67)
Actual First Grade Enrollment (1967-73)

Fig. 12

UNITED STATES of America,

Plaintiff,

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein, Intervening Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,

Defendants,

OTIS R. BROWN, as Governor of the State of Indiana, et al.,

Added Defendants,

CITIZENS FOR QUALITY SCHOOLS, INC.,

Intervening Defendant,

COALITION FOR INTEGRATED EDUCATION,

Amicus Curiae,

HAMILTON SOUTHEASTERN SCHOOLS, HAMILTON COUNTY, INDIANA, ET AL.,

Additional Added Defendants.

No. IP 68-C-225.
UNITED STATES DISTRICT COURT,
S. D. Indiana,
Indianapolis Division.

July 20, 1973.

As Corrected Nov. 12, 1973.
Supplemental Opinion Dec. 6, 1973.

SUPPLEMENTAL MEMORANDUM OF DECISION

I. *Introduction*

Heretofore, on August 18, 1971, the Court filed herein its Memorandum of Decision, incorporating its findings of fact and conclusion of law, and making certain interim orders, with respect to the issues presented by the complaint of the original plaintiff, United States of America, and the answer of the original defendants, The Board of School Commissioners of the City of Indianapolis, the individual members of such Board, and the Board's appointed Superintendent of schools. Such decision, which will be referred to hereafter as *"Indianapolis I,"* is reported in D. C., 332 F. Supp. 655, aff'd, 474 F. 2d 81 (7 Cir. 1973), cert. den., 413 U. S. 920, 93 S. Ct. 3066, 37 L. Ed. 2d 1041 (1973).

Thereafter, on July 20, 1973, the Court filed herein a second Memorandum of Decision, incorporating its findings of fact and conclusions of law, and making certain interim orders, with respect to certain issues presented by the complaint of the original and added plaintiffs, Donny Brurell Buckley, et al. and the answers of the original and added defendants. Such decision will be referred to hereafter as *"Indianapolis II,"* is reported ante, p. 1191, 37 Ind. Dec. 524, and is now on appeal to the Court of Appeals for the Seventh Circuit, Nos. 73-1968 to 73-1984, incl.

The key decision made in *Indianapolis I* was that the Indianapolis public school system (hereafter "IPS") was being operated by the original defendants, and had been operated by their predecessors in office, as a system practicing *de jure* segregation of students of the Negro race. It was therefore held that the Negro students were being denied the equal protection of the laws, as guaranteed by the Fourteenth Amendment. Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686,

98 L. Ed. 873 (1954). Certain interim measures tending to prevent further segregation were ordered, pending consideration of the questions to be presented and later decided in *Indianapolis II*, it being understood that the law required the defendants to take affirmative action to desegregate IPS. Green v. County School Board, 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968).

The key decisions made in *Indianapolis II* were that (1) as a practical matter, desegregation promising a reasonable degree of permanence could not be accomplished within the present boundaries of IPS and (2) added defendant officials of the State of Indiana, their predecessors in office, the added defendant The Indiana State Board of Education, and the State itself have, by various acts and omissions, promoted segregation and inhibited desegregation with IPS, so that the State, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to desegregate IPS.

The Court also held in *Indianapolis II* that IPS could be effectively desegregated either by combining its territory with that of all or part of the territory served by certain added defendant school corporations, into a metropolitan system or systems, and then reassigning pupils within the expanded system or systems thus created, or by transferring Negro students from IPS to added defendant school corporations, either on a one-way or an exchange basis. It further held that the State, through its General Assembly, should be first afforded the opportunity to select its own plan, but that if it failed to do so within a reasonable time, the Court would have the power and the duty to promulgate its own plan, and place it in effect. Bradley et al. v. Milliken et al, 484 F. 2d 215 (6 Cir. 1973). See Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964

By way of affirmative relief pending action by the General Assembly, the Court ordered IPS to effect pupil reassignments

for the 1973-74 school year sufficient to bring the number of Negro pupils in each of its elementary schools to approximately 15%, which has been accomplished. The Court also directed IPS to transfer to certain added defendant school corporations, and for such corporations to receive and enroll, a number of Negro students equal to 5% of the 1972-73 enrollment of each transferee school, with certain exceptions. This order was, on August 8, 1973, stayed by the Court until the 1973-74 school year by an order made in open court but not previously reduced to writing.

At this time, certain matters have been presented to the Court, both formally and informally, which require further rulings in the premises. Such rulings are now made, as hereafter set out, as supplementary to or, in some instances, in lieu of rulings heretofore entered in *Indianapolis II*, as heretofore modified.

II. *The Question of a "Reasonable Time" for State Action*

[15] As stated, it was the Court's conclusion that the State should be afforded the opportunity, for a reasonable period of time, to discharge its affirmative duty to desegregate IPS. The question has arisen as to how long a time is reasonable.

As the Court knew judicially at the time it entered its decision in *Indianapolis II*, the General Assembly was scheduled to organize in November, 1973, for a session to begin in early January, 1974. It has so organized, and numerous bills have already been introduced—none, to the Court's knowledge, having to do with the subject at hand. As the Court also knows judicially, various legislative leaders have publicly announced that the coming session is expected to be short, and targeted for conclusion within a matter of a month or so.

Under the circumstances, considering the urgency of the problem presented, the fact that members of the General Assembly have had since July 20, 1973 to consider the prob-

lem, and the anticipated length of the coming legislative session, the Court considers a reasonable time within which the General Assembly should act to be the end of its January, 1974 session or February 15, 1974, whichever date is sooner. The Court also considers that any legislation adopted by the General Assembly on the subject of the desegregation of IPS should be effective for the 1974-75 school year.

III. *The Duty of the General Assembly*

In its opinion in *Indianapolis II*, the Court pointed out in section IV thereof that the ultimate responsibility for the operation of all public schools in Indiana lies in the General Assembly, and that it has the undoubted power to desegregate IPS by appropriate legislation, citing the Indiana Constitution and some twenty cases decided by the Indiana Supreme and Appellate Courts. It also held that it was the General Assembly's duty to do so, based upon its findings from the evidence that it is not possible for the IPS School Commissioners to bring about a lasting desegregation within IPS boundaries.

[16] In reviewing that opinion, it now occurs to the Court that it perhaps placed undue stress on the General Assembly's power, and not enough on its duty; this failure of direction on the part of the Court may account for the General Assembly's seeming lack of attention to the problem to date, as the Court has no reason to doubt that the able members of that body will do their sworn duty to support the Constitution, once that duty is more clearly defined. By "sworn duty," the Court of course refers to the oath taken by each member of the General Assembly pursuant to Article 6, Clause 3 of the Constitution of the United States, which reads, in applicable part, as follows:

> ". . .(T)he Members of the several state Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; . . ."

As to what duty entails, in this instance, may be best ascertained by the guidelines laid down by the Supreme Court of the United States, whose decision and interpretations of the Constitution are final and binding on all citizens, including elected and appointed public officials, unless thereafter changed by that Court or by Constitutional amendment. Marbury v. Madison (U. S.) 1 Cranch 137, 2 L. Ed. 60 (1803). It is such guidelines which this Court has endeavored to follow to date in this rather difficult case—not because of any personal views of the Court, but for the simple reason that they constitute the law of the land, in every State and Territory, and the Court, pursuant to its own oath, may do no less. These guidelines, expressed in direct quotation from significant opinions of the Supreme Court, are as follows:

> "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . .
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place . . . Plaintiffs are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . ." Brown v. Board of Education of Topeka, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (Brown I)
>
> ". . . (T)he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. . . ." Brown v. Board of Education of Topeka, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) (Brown II)
>
> ". . . (T)he members of the School Board and the Superintendent of Schools are local officials; from the point of

view of the Fourteenth Amendment, they stand in this litigation as the agents of the State. . . .

* * * * *

"Article 6 of the Constitution makes the Constitution the 'Supreme Law of the Land.' . . . (T)he federal judiciary is supreme in the exposition of the law of the Constitution. . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown Case is the supreme law of the land, and Art. 6 of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. 6, cl. 3, 'to support this Constitution.' . . . No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. . . ." Cooper v. Aaron 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, 19 (1958).

"Delays in desegregating school systems are no longer tolerable," Bradley v. School Board of Richmond, 382 U. S. 103, 86 S. Ct. 224, 15 L. Ed. 2d 187 (1965).

"The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

* * * * *

"The obligation of the district courts . . . is to assess the effectiveness of a proposed plan in achieving desegregation. . . . The matter must be assessed in light of the circumstances present and the options available in each instance.

* * * * *

" ' "Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. . . . (I)f it fails to undo segregation, other means must be used to achieve this end.' " Green v. County School Board of New Kent County, 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968).

"We do not hold that 'free transfer' can have no place in a desegregation plan. But like 'freedom of choice,' if it cannot be shown that such a plan will further rather than

delay conversion to a unitary, non-racial, nondiscriminatory school system, it must be held unacceptable." Monroe v. Board of Commissioners, 391 U. S. 450, 88 S. Ct. 1700, 20 L. Ed. 2d 733 (1968).

"Nearly 17 years ago this Court held, in explicit terms, that State-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings.

. . .

* * * * *

"The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. . . .

"If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

* * * * *

"The school authorities argue that the equity powers of federal district courts have been limited by Title IV of the Civil Rights Act of 1964, 42 USC § 2000c. The language and the history of Title IV shows that it was enacted not to limit but to define the role of the Federal Government in the implementation of the Brown I decision. . . .

* * * * *

". . . The proviso in § 2000c-6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers.

. . .

* * * * *

". . . Bus transportation has been an integral part of the public education system for years. . . . Eighteen million of the Nation's public school children . . . were transported to their schools by bus in 1969-70 in all parts of the country.

". . . The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

"Thus the remedial techniques used in the District Court's order [pairing, busing, etc.] were [well] within that court's power to provide equitable relief. . . ." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U. S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971).

"As we have held, 'neighborhood school zoning' . . . is not the only constitutionally permissible remedy; nor it is per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. . . . The measure of any desegregation plan is its effectiveness.

"On the record before us, it is clear that . . . inadequate consideration was given to the use of bus transportation and split zoning. . . ." Davis v. Board of School Commrs., 402 U.S. 33, 91 S. Ct. 1289, 28 L. Ed. 2d 577 (1971).

"Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate dual school systems.

"Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. . . . (T)he Constitution does not compel any particular degree of racial balance or mixing but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. . . .

> "We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations. . . . (B)us transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." North Carolina Bd. of Ed. v. Swann, 402 U. S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971)

IV. *Guidelines of this Court—General*

[17] It is, of course, recognized by the Court that it cannot issue a positive order to the General Assembly to enact specific legislation. It is for such reason that the Court has suggested several different methods by which the General Assembly could approach the problem of effectively desegregating IPS, and it does not imply that there may not be other equally effective methods which may occur to that body.

Within the contest of what has been suggested as possible alternatives, however, the Court offers further observations, as follows:

(1) With respect to the concept of one metropolitan school district, embracing the area designated in Figure 1, attached to the Court's opinion in *Indianapolis II*, it is apparent that some advantages would be obtained from such a system. To name a few, a uniform tax base would be provided for the education of the more than 200,000 pupils in the combined system, and economy in operation could be achieved through central purchasing and reduction of administrative overhead. Complete desegregation would be simplified. On the other hand, it may be that such a system would be too large in terms of difficulty of administration and remoteness of the central office from school patrons.

(2) With respect to the concept of creating various new metropolitan districts—for example, six or eight to replace the

present twenty-four pictured on Figure 1, it is apparent that some of the advantages above noted would be reduced, and some of the disadvantages improved. Another alternate, of course, would be to create one metropolitan system for taxing purposes, which in turn would be subdivided into several semi-autonomous local districts. So long as IPS and the local districts are each effectively desegregated, the method used would be constitutionally immaterial.

[18] (3) With respect to the concept of permitting the present school corporations shown on said Figure 1 to remain as is, insofar as geography and control is concerned, such a solution would of course preserve local autonomy, and this Court would have no reason to disapprove such a solution, so long as each such corporation is required to participate in the desegregation of IPS. Put in other terms, local autonomy for such corporations is, under the law of Indiana, a privilege—not a right—all as discussed in detail in *Indianapolis II*. The consideration for permitting the various corporations to continue their separate existences might therefore be stated to be their participation in a meaningful plan to desegregate IPS. Some of the pertinent facts which the General Assembly may wish to consider in this regard are set out in the next two sections hereof.

V. *Transfer of Pupils*

When speaking of the transfer of pupils, the first logical question is as to the numbers involved. In this connection, the focus must be on the elementary schools within IPS which were not affected by the interim plan adopted by the Court for the present school year, and which have an enrollment of Negro pupils exceeding 80%. There are nineteen such schools, fourteen of which have Negro enrollments in excess of 97%. Two additional schools have enrollments exceeding 60%, and should also be considered. The total enrollment of black students in these 21 schools, excluding kindergarten and special education students, is approximately 11,500.

The General Assembly might order the exchange of all or a substantial part of these 11,500 students with students from the suburban school corporations. For purposes of illustration, if it were determined to desegregate such schools on the basis of approximately 85% white—15% black, then about 9,775 black children would need to be transferred to suburban schools, and about the same number of non-black children would need to be transferred to IPS.

There is case law to the effect that transfers of students must be made on an approximately equal basis insofar as the races are concerned, unless there is good reason why this should not be done. In such cases it has been held that to impose the "burden" of being transported wholly or largely upon students of one race is yet another form of racial discrimination and in violation of the Fourteenth Amendment rights of the group transported. United States v. Texas Education Agency, 467 F. 2d 848 (5 Cir. 1972); Lee v. Macon County Board of Education, 448 F. 2d 746 (5 Cir. 1971); Haney v. County, Board of Education of Sevier County, 429 F. 2d 364 (8 Cir. 1970). Such cases, if followed, would seem to mandate so-called "two-way" busing, absent compelling reasons to the contrary.

The Supreme Court has not specifically addressed itself to this question. However, it is worthy of note that in McDaniel v. Barresi, 402 U. S. 39, 91 S. Ct. 1287, 28 L. Ed. 2d 582 (1971), that Court approved a desegregation plan adopted by the Clarke County (Ga.) Board of Education which reassigned pupils in five heavily Negro " 'pockets' " to other attendance zones, busing many of them without any corresponding busing of whites. Other "one-way" busing plans have likewise been approved, depending on the factual setting. Hart v. County School Board, 459 F. 2d 981 (4 Cir. 1972); Norwalk Core v. Norwalk Board of Education, 423 F. 2d 121 (2 Cir. 1970). Indeed, the Fourth Circuit has flatly held that a pattern of assigning Negro students to formerly all-white schools, without requiring similar travel on the part of whites, does not violate the

equal protection clause of the Fourteenth Amendment, Allen v. Asheville City Board of Education, 434 F. 2d 902 (4 Cir. 1970). Moreover, analysis of the cases cited in the preceding paragraph indicates they have been decided on their particular facts, even though some of the language is in terms of absolute requirements.

The Court does not find it necessary to attempt to resolve this question in terms of constitutional absolutes, nor could it appropriately do so on the present record, since the question has not been squarely presented. However, the record does contain undisputed evidence that virtually all of the twenty-one IPS elementary schools above referred to (located as shown on Figure 13, attached) are substantially out of line with the requirements of present Indiana law and regulations establishing minimum acreage requirements for elementary schools. The regulations require seven acres for schools with 200 or less pupils, plus an additional acre for each additional 100 pupils or major fraction thereof. Burns' Indiana Rules & Regs., § (28-415)-3. As reflected in Figure 14, attached, only one of these schools meets acreage requirements. Most schools are grossly deficient in the space required—for example, the pupil density at School 66 is 544.21 pupils per acre, and is 493.57 per acre at School 42 and 481.33 per acre at School 73. By way of comparison, the pupil density at School 42, taking into consideration its enrollment and the State formula, should be 57.58 pupils per acre. It is thus overcrowded by 857.18%!

The evidence further shows that, with a few exceptions, the twenty-one schools in question are among the older schools in the IPS system—some dating back 100 years, more or less. Although there is no evidence that the Board of School Commissioners has not maintained such schools as well as could be expected under the circumstances, it is a fair inference, subject to further proof, that the type of construction, use of flammable materials, etc., would fail by a wide margin to meet safety stand-

ards for newly constructed schools. On the other hand, the evidence discloses that the school plants maintained by added defendant school corporations are, for the most part, relatively new and in compliance with acreage and safety standards.

[19] On the basis of the foregoing facts, therefore, this Court would not feel justified in condemning out of hand a "one-way" suburban busing plan involving pupils from such of the twenty-one schools as may seem to the Board, on analysis, to afford inadequate educational plant facilities, viewed in the light of current standards. Additionally, such a plan would involve transportation of substantially fewer pupils, and therefore be less expensive.

Finally, unless convinced to the contrary by additional evidence in an appropriate hearing, this Court is not prepared to characterize busing as an unmitigated "burden." Although it might appear to a child to be "burdensome" to be deprived of walking to school in the warm days of May and September (which presupposes that children do not like to ride in motor vehicles with their neighborhood friends—a somewhat novel concept to the Court), the Court doubts that it would seem such a burden to be transported in a heated bus through the rain, sleet, and snow so familiar in this latitude during other months of the school term. As pointed out in *Indianapolis II*, nearly 80% of suburban pupils (more than 80% since the elimination of Greenfield) are bused to school at the present time, without complaint.

[20] The Court is not of the opinion that it would be wise to require transportation of kindergarten pupils, primarily because of their age, nor to transport special education pupils because of the various special problems which would inevitably arise in this regard. Further, the Court recognizes that special problems arise with respect to high school pupils, which might render their transfer counter-productive once their high school training has begun. As to pupils in grades 1-8, however, the

Court knows of no reason why transfer of pupils, in whatever fashion the General Assembly may elect, would not be reasonable and practical to accomplish the constitutional duty imposed by the Supreme Court, with the understanding, of course, that a transferred elementary pupil would thereafter routinely continue to be transferred to the same transferee school corporation for continued education through high school.

If, for example, transfers were made of Negro pupils from those of the twenty-one schools failing to meet modern standards to the schools of added defendants situate within the geographical area depicted in said Figure 1, all of those transferred would be afforded education in a desegregated setting. It should be no great task to desegregate the remaining school or schools within IPS. The Court estimates, based on the statistics and projections in the record, that it would be necessary for the suburban schools within such Figure 1 area, excluding the Washington Township and Pike Township schools, to accept transfer of IPS elementary pupils in grades 1-8 in number equivalent to approximately 15% of their 1973-74 enrollments in the same grades in order to accomplish this result.

After such transfers were accomplished, the racial percentages in each school to which transfers were made would be approximately 87% white and 13% Negro—a ratio which, by coincidence, would approximate that of the nation as a whole. As regards Washington Township, its minority percentage as projected for the present school year is already this high, so that general 1-8 transfers to this defendant would not appear to be indicated; however, the acceptance of pupil initiated transfers from IPS to its Everett J. Light Industrial Center, to the extent that vacancies exist, might well be required. Pike Township likewise has a substantial minority percentage at this time; however, a number of transfers sufficient to increase such percentage to a figure approximating that of the other suburban schools should be considered.

VI. *Costs and Mechanics of Transfers*

One advantage of the dual transfer system would be that if approximately equal numbers of pupils were transferred to and from suburban schools, tuition, transportation, and other costs would balance out as between IPS and the various other corporations, and no additions to school plants would be necessary. On the other hand, more pupils would be transported, thus increasing this total cost, and such a system would continue the use of the IPS antique buildings and grounds.

[21] A one-way transfer plan would involve substantial tuition payments from IPS to the transferee schools. To the extent that such tuition applied only to the actual per capita cost of instruction, utilities, maintenance service, etc., no hardship would be imposed upon IPS, because it is apparent that IPS expense for such services would be correspondingly reduced. However, the present transfer law, IC 1971, 20-8.1-6-1 through 20-8.1-6-15, as amended, Burns' §§ 28-5001 through 28-5015, also contemplates charges related to the fair value of the transferee school plant, tax levies for building purposes, and other items related to capital outlay of the transferee school. Considering that the State of Indiana is itself at fault in this matter, as previously found, the General Assembly should consider whether the State should be required to contribute the necessary amount to compensate the transferee corporations for the use of their respective plants. Such a provision, with an appropriate formula, could be adopted as an amendment to the existing transfer law.

It is possible that the General Assembly could discharge its duty in this matter simply by amending the existing transfer law. The purpose of such law, as the Court understands it, is to permit the better accommodation of school children. As pointed out in Section III hereof, the Supreme Court of the United States has held that for a minority child to be compelled to

attend a segregated school denies the Fourteenth Amendment rights of such child: in effect, the child is not properly accommodated. Therefore, if the transfer law were amended to recognize transfers to accomplish desegregation of a school system which has been finally adjudged to have been segregated *de jure* (as is true in the case of IPS), a basis would be established for other necessary changes regarding time of payment of tuition, the share to be borne by the State, the matter of responsibility for and payment of the cost of transportation, and similar details. Since the actual number or percentage of pupils to be transferred is more of an administrative detail than a legislative function, this matter could be left to the discretion of the local school board or boards, subject to the approval of the court having jurisdiction of the case.

VII. *Vacation of Certain Previous Orders*

The various orders contained in *Indianapolis II*, and heretofore stayed by the Court, requiring certain transfers of pupils from IPS to added defendants are each vacated and set aside. It should be understood, however, that the reason for this ruling is simply that it would be inconsistent to permit such orders to stand, although stayed, inasmuch as the General Assembly, in the exercise of its discretion, may desire to adopt an acceptable plan which would be inconsistent with such orders.

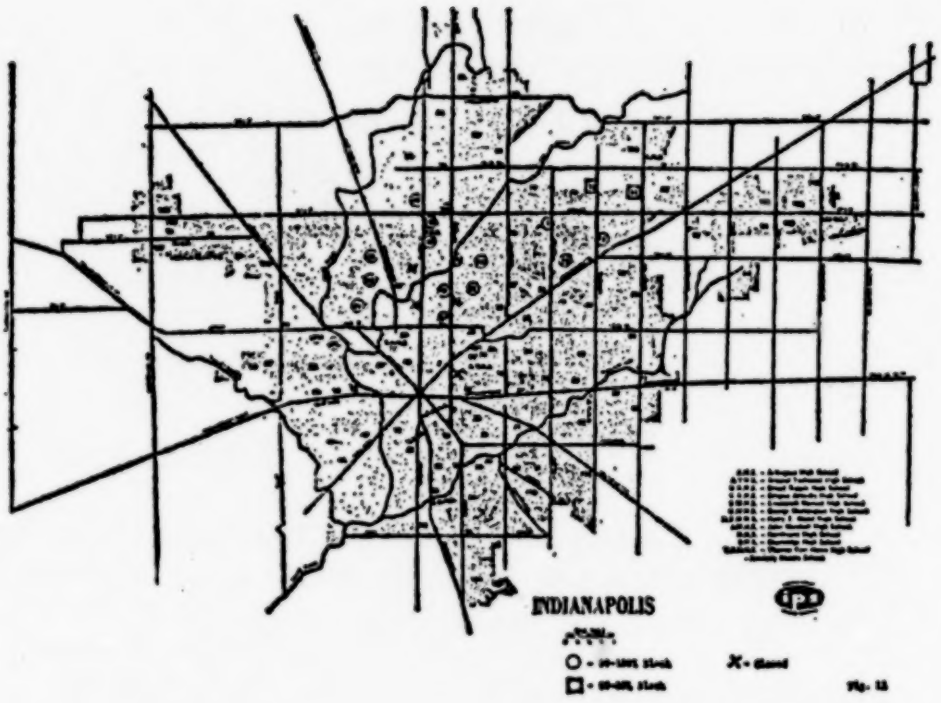
Moreover, the 5% order contained in *Indianapolis II* was designated as a mere interim order, it having been the Court's opinion that such amount of transfers would have been the most which could reasonably be expected to be accomplished within the limited time between the date of the order and the beginning of the 1973-74 school term. As it happened, added defendants were able to convince the Court that even this limited relief could not be accomplished within the time available, hence the stay. At this time the Court looks forward to a permanent solution to the problem of desegregating IPS, which will either

come from the General Assembly, as it should, or from this Court in the event of legislative default. From what has been said herein, it should be apparent that the Court does not at this time consider 5% transfers as an adequate permanent solution. Indeed, if the solution is handed back to the Court by default, additional scrutiny will necessarily be given to complete consolidation along metropolitan lines.

[22] However, by vacating its previous orders, it is not the intention of the Court to render moot the appeals now being prosecuted by added defendants. To the contrary, the Court is of the opinion that its conclusions of law as contained in *Indianapolis II*, as modified and supplemented herein, regarding the duty of the State to desegregate IPS, the State's power to adopt a metropolitan plan or transfer plan for such purpose, and the duty of the Court to promulgate such a plan in default of State action within the time presented, all involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from such rulings will materially advance the ultimate termination of this litigation. It is therefore respectfully suggested that the Court of Appeals determine said appeals on the merits, as provided in 28 U. S. C. § 1292(b).

Further, the Court in its previous order of July 20, 1973, *Indianapolis II*, entered the following: "All defendants who have not done so are directed to institute appropriate in-service training courses for their respective faculties and staff, and otherwise to orient their thinking and those of their pupils toward alleviating the problems of segregation." This order was not, and is not stayed, and neither is it vacated. It therefore remains as a continuing and final order, operating against added defendant school corporations, and accordingly does not appear to be moot.

[See following illustration]



A	B	C	D	E	F	G
1	853	3.4	14	250.88	60.92	411.81
27	845	1.75	13	482.95	65.00	742.84
41	1157	3.0	17	385.66	68.05	566.73
42	691	1.4	12	493.57	57.58	857.18
43	811	2.6	13	311.92	62.38	500.03
44	1036	3.5	15	296.00	69.06	428.61
45	884	2.5	14	353.60	63.14	560.02
48	589	3.6	11	163.61	53.54	305.58
53	1068	10.0	16	106.80	66.75	160.00
56	655	1.7	12	385.29	54.58	705.91
60 **	1152	2.9	17	397.24	67.76	586.24
63	383	1.5	9	255.33	42.55	600.07
66	1034	1.9	15	544.21	68.93	789.51
71	1274	8.2	18	155.36	70.77	219.52
73	1083	2.25	16	481.33	67.68	711.18
75	793	1.75	13	453.14	61.00	742.85
76	594	1.5	11	396.00	54.00	733.33
83	496	11.0	10	45.09	49.60	-9.10
110	1296	10.6	18	122.26	72.00	194.26
Ken.*	552	1.5	11	368.00	50.18	733.35

** School 60 and Mapleton-Fall Creek School

* Kennedy Middle School

A—Elementary Schools

B—September 1972 Enrollment

C—Acreage of School Site

D—Minimum State Required Acreage

E—Pupils Per Actual Acre

F—Pupils Per Minimum Required Acre

G—Percent Overcrowded

Fig. 14

APPENDIX B.

JUDGMENT SOUGHT TO BE REVIEWED.
Opinion by Judge Swygert
(Judge Tone dissenting)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 16, 1976

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DONNY BRURELL BUCKLEY, et al., etc.,
Intervening Plaintiffs-Appellees,

Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965, and 75-2007

vs.

BOARD OF COMMISSIONERS OF CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP-68-C-225

S. Hugh Dillin, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

UNITED STATES OF AMERICA,
Plaintiff,

DONNY BRURELL BUCKLEY, et al.,
Intervening Plaintiffs,

vs.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants.

No. IP-68-C-225

Plaintiff-intervenors allege:

1. This Court has jurisdiction of action pursuant to 42 U. S. C. 1983 and 1988, 28 U. S. C. 1343(3), 2201 and 2202, and the Fourteenth Amendment to the Constitution of the United States.

2. Plaintiff-intervenors are Negro children and their parents who reside in the areas served by public schools maintained and operated by one or more of the defendant school authorities and who are eligible to attend such public schools. Plaintiff-intervenors sue on behalf of themselves and all other school-age children, and their parents, similarly situated in the areas served by the defendant school authorities. Plaintiff intervenors satisfy all requirements of Rule 23, F. R. Civ. P., and in particular the class represented is so numerous that joinder of all members is impracticable, these are questions of law and fact common to the class, the claims of plaintiff-intervenors are typical of the

claims of the class, and plaintiff-intervenors will fairly and adequately protect the interests of the class.

3. Defendant Edgar D. Whitcomb is the Governor and chief executive officer of the State of Indiana, and as such he is charged with the faithful execution of the Constitution and laws of Indiana in a manner consistent with the Constitution and laws of the United States.

4. Defendant Theodore Sendak is the Attorney General and chief legal officer of the State of Indiana and as such he is responsible for the enforcement of the Constitution and laws of Indiana in a manner consistent with the Constitution and laws of the United States.

5. Defendant John J. Loughlin is the Superintendent of Public Instruction of the State of Indiana and as such is charged by law with the administration of the system of public instruction and general superintendence of the business relating to the common schools in a manner consistent with the requirements of the Constitution and laws of the United States, and he is obligated to implement the public policy of the State of Indiana to provide, furnish, and make available equal, nonsegregated, nondiscriminatory educational opportunities for all regardless of race, creed, national origin, color or sex, and to eliminate and prohibit segregated or separate schools or school districts on the basis of race, creed, or color. He is further obliged by law to report and recommend to the general assembly remedies for observed imperfections in the operation of the public schools.

6. Defendants Board of School Commissioners of the City of Indianapolis; Metropolitan School District of Washington Township; Metropolitan School District of Lawrence Township; Metropolitan School District of Warren Township; Franklin Township Community School Corp.; Metropolitan School District of Perry Township; Metropolitan School District of Decatur Township; Metropolitan School District of Wayne Township; Metropolitan School District of Pike Township; School Town of Speedway; and Beech Grove City Schools; Carmel-Clay

Schools, Hamilton County, Indiana; Mt. Vernon Community School Corp., Hancock County, Indiana; Greenfield Central Community School Corp., Hancock County, Indiana; Greenwood Community School Corp., Johnson County, Indiana; Mooresville Consolidated School Corp., Morgan County, Indiana; Plainfield Community School Corp., Hendricks County, Indiana; Avon Community School Corp., Hendricks County, Indiana; Eagle-Union Community School Corp., Boone County, Indiana; and Brownsburg Community School Corp., Hendricks County, Indiana, are all common school corporations organized and existing under the laws of the State of Indiana with geographical boundaries within Marion County, Indiana, or within the Indianapolis Metropolitan Statistical Area as defined by the United States Census, and acting as agents of the State of Indiana to fulfill the duty imposed upon it by the State Constitution to provide for a general and uniform system of common schools; and they are obliged to discharge that responsibility in a manner consistent with the requirements of the Constitution and laws of the United States; and they are proper parties defendant to this action.

7. The defendant Indiana State Board of Education is a public corporate body in general charge of the schools of the State of Indiana.

8. All defendants reside or perform their official duties, in which capacity they are sued, in the southern judicial district of Indiana.

9. By their present method of maintaining and operating separate school corporations, the defendants have effected racial segregation and discrimination in the operation of public schools and school systems serving Marion County, Indiana, and the Indianapolis metropolitan area, in violation of the rights secured to plaintiff-intervenors by the Fourteenth Amendment to the Constitution of the United States and Article VIII, Section I of the Constitution of Indiana.

10. Section 314 of Chapter 173 of 1969, Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), which chapter is known as the "Consolidated First Class Cities and Counties Act" is unconstitutional and void insofar as it purports to exempt from the scope and effect of said act the consolidation of all school corporations within Marion County, Indiana. The purpose and effect of such exemption as further implemented and enabled by the provisions of Chapter 186 of the Acts of 1961, Burns Ind. Stat. Ann. § 28-2338 to 28-2347 (1968 Cum. Supp.) and Chapter 52 of the Acts of 1969, Burns Ind. Stat. Ann. § 28-2346a (1970 Cum. Supp.) have been and are to perpetuate segregation on the basis of race and to inhibit desegregation in the public schools and school systems of Marion County.

11. The State of Indiana, acting through the defendants and their predecessors and otherwise, has engaged in acts, practices, customs, and usages which have had the natural, probable, foreseeable, and actual effect of incorporating into schools and school systems serving Marion County and the Indianapolis metropolitan area public and private residential racial segregation and discrimination, in violation of the right of plaintiff-intervenors not to be segregated on the basis of race in public schools and school districts.

12. The State of Indiana, acting through the defendants and their predecessors and otherwise, has allocated and permitted to be allocated educational resources in a manner that has had the natural, probable, forseeable and actual effects, in the Indianapolis metropolitan area, of: (a) discriminating on the basis of race against children attending the public schools within the School City of Indianapolis; and (b) establishing and maintaining the pattern of racially separate schools and school systems as described in paragraph eight (8) above, in violation of the rights secured to plaintiff-intervenors by the Fourteenth Amendment to the United States Constitution and the Constitution and laws of Indiana.

13. The defendants' present method of operating separate school corporations in Marion County and the Indianapolis metropolitan area, with the discriminatory effects described herein, is not required for the fulfillment of the State's *bona fide* educational objectives.

14. The defendants have implemented other forms of school organization in the State of Indiana and in and about the Indianapolis metropolitan area which have circumvented, crossed, and otherwise disregarded political boundaries for the purpose of achieving educational objectives within and among single school communities in the Indianapolis metropolitan area and elsewhere in Indiana.

15. Other educationally sound, feasible and practicable alternative methods of school and school district organization are reasonably available to the defendants and their implementation would fulfill the defendants' educational objectives within the requirement that they operate now and hereafter only unitary schools and school systems.

16. Plaintiff-intervenors reallege and incorporate here by reference, as if fully set out, the allegations of paragraphs 3, 8, 9, 10, 11, and 12 of the complaint of plaintiff United States filed on May 31, 1968.

WHEREFORE, plaintiff-intervenors pray that this Court adjudge, decree, and declare that Chapter 186 of the Indiana Acts of 1961, Chapter 52 of the Acts of 1969, and Chapter 173 of the Acts of 1969 are unconstitutional, null, and void, insofar as they effect racially separate public schools and school systems in Marion County and the Indianapolis metropolitan area.

Plaintiff-intervenors further pray that the defendants, their agents, servants, employees, and all persons in active concert or participation with them be preliminarily and permanently enjoined and restrained to take forthwith all steps reasonably necessary to secure to plaintiff-intervenors their right to attend racially nonsegregated and nondiscriminatory schools and school systems, including if necessary:

(a) the consolidation or merger of the defendant school systems in all aspects of school operation and administration, including but not limited to, the appointment of an acting superintendent to manage the consolidated systems, the merger of the existing Boards of Education pending the selection by election, appointment, or otherwise of a new Board of Education representative of the consolidated system, and further requiring that board shall be the successor Board of Education for the defendant school systems assuming all rights, powers, responsibilities, duties and obligations presently held, in whole or in part, by the defendant school boards; and further requiring that each defendant shall, by withholding of funds or accreditation and by the exercise of any and all powers available to each, insure the full cooperation of the other defendants and the prompt accomplishment of said consolidation or merger; or

(b) the adoption and implementation by all defendants of such agreements, contracts, or other arrangements with respect to the operation of educational systems in the Indianapolis metropolitan area as will secure to plaintiff-intervenors equal educational opportunities in segregated and nondiscriminatory schools and school systems;

Plaintiffs further pray that this Court require the defendants to prepare and submit for approval of the Court a plan for the operation of all the public schools within the defendant school systems in conformity with the requirements of the Fourteenth Amendment, including but not limited to, the nondiscriminatory allocation of resources, the establishment of schools, pupil populations, staffs, faculties, transportation routes and extracurricular activities which are not racially identifiable, and to be effective at the earliest possible date.

Plaintiff-intervenors further pray that this Court allow them their costs herein and reasonable attorneys' fees.

Plaintiffs further pray for each other, further or additional relief as to the Court may appear just and necessary.

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October 21, 1971

APPENDIX D.

CONSTITUTIONAL PROVISION.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, §1.

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTE

EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974,

P.L. 93-380, Title II, 20 U. S. C. § 1701, et seq.

§ 1701. Congressional declaration of policy

(a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

§ 1702. Congressional findings; necessity for Congress to specify appropriate remedies for elimination of dual school systems without affecting judicial enforcement of fifth and fourteenth amendments

(a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amount of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational,

and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

* * * * *

§ 1712. Formulating remedies; applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

§ 1713. Priority of remedies

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

* * * * *

§ 1716. Voluntary adoption of remedies

Nothing in this subchapter prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this subchapter nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this subchapter, if such plan is voluntarily proposed by the appropriate educational agency.

* * * * *

§ 1755. Additional priority of remedies after finding of de jure segregation

Notwithstanding any other provision of law, after June 30, 1974 no court of the United States shall order the implementa-

tion of any plan to remedy a finding of de jure segregation which involves the transportation of students, unless the court first finds that all alternative remedies are inadequate.

* * * * *

§ 1758. Reasonable time for developing voluntary school desegregation plans following detailed notice of violations

Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.

INDIANA STATUTE

Indiana Acts 1974, P. L. 94, codified as IC 20-8.1-6.5.

20-8.1-6.5-1. Court ordered transfers—Applications of law—Limitations.—This chapter [20-8.1-6.5-1—20-8.1-6.5-10] concerns the transfer of students for education from one school corporation (transferor corporation) to another school corporation (transferee corporation) in compliance with a court order as described in this section. This chapter applies solely in a situation where a court of the United States or of the state of Indiana in a suit to which the transferor or transferee corporation or corporations are parties has found the following: (a) a transferor corporation has violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders; (b) a unitary school system within the meaning of such amendment cannot be implemented within the

boundaries of the transferor corporation; and (c) the fourteenth amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment. This chapter shall not apply until all appeals from such order, whether taken by the transferor corporation, any transferee corporation or any party to the action, have been exhausted or the time for taking such appeals has expired, except where all stays of a transfer order pending appeal or further court action have been denied. [IC 1971, 20-8.1-6.5-1, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-2. Definitions.—As used in this chapter [20-8.1-6.5-1—20-8.1-6.5-10]:

(a) "Transferor corporation," "transferee corporation" and "transferred student" shall mean, respectively, the school corporation transferring students, the school corporation receiving students, and any student transferred pursuant to a court order described in section 1 [20-8.1-6.5-1] of this chapter.

(b) "General fund," "cumulative building fund" and "debt service fund" shall refer, respectively, to the school corporation funds set up under the provisions of IC 1971, 21-2-11 [21-2-11-1—21-2-11-8], 21-2-6 [21-2-6-1—21-2-6-3] and 21-2-4 [21-2-4-1—21-2-4-6], respectively.

(c) "Class of school" shall refer to a classification of each school in the transferee corporation by the grades taught therein (generally denominated as elementary schools, middle schools or junior high schools, high schools, and special schools such as schools for special education, vocational training or career education). Elementary schools shall include schools containing kindergarten, but for all purposes under this chapter, a kindergarten student shall be counted as ½ a student.

(d) "ADM" shall refer to ADM as defined in IC 1971, 21-3-1.5 [21-3-1.5—21-3-1.5-5]. [IC 1971, 20-8.1-6.5-2, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-3. Transfer tuition—Computation and payment —Payment of book rental.—(a) The transferee corporation shall be entitled to receive from the transferor corporation transfer tuition for each transferred student for each school year calculated in two [2] parts: operating cost and capital cost. These shall be allocated on a per student basis separately for each class of school.

(b) The operating cost for each class of school shall be based on the total expenditures of the transferee corporation for such class from its general fund expenditures as set out on the classified budget forms prescribed by the state board of accounts, excluding from such calculation capital outlay, debt service, costs of transportation, salaries of board members, contracted service for legal expenses and any expenditure which is made out of the general fund from extracurricular account receipts, for the school year.

(c) The capital cost for each class of school shall consist of the lesser of the following two [2] alternatives: Alternative one [1] shall be based on an amount equal to five per cent [5%] of the cost of transferee corporation's physical plant, equipment and all appurtenances thereto (including but not limited to buildings, additions and remodeling thereof, except ordinary maintenance, on-site and off-site improvements such as walks, sewers, waterlines, drives and playgrounds) theretofore paid or obligated to be paid in the future out of the general fund, cumulative building fund or debt service fund, including but not limited to principal and interest and lease rental payments (or out of funds which were legal predecessors to these funds). Where any item of physical plant, equipment appurtenances, or portion thereof is more than twenty [20] years old at the beginning of the school year, the capital cost thereof shall be disregarded in making such computation. Alternative two [2] shall be based on the amount budgeted from the general fund for capital outlay for physical plant, equipment and appurte-

nances and the amounts levied for the debt service fund and the cumulative building fund, for the calendar year in which the school year ends.

(d) Where an item of expense or cost cannot be allocated to a class of school, it shall be prorated to all classes of schools on the basis of the ADM of each class in the transferee corporation compared to the total ADM therein.

(e) The transfer tuition for each student transferred for each school year shall be calculated by dividing the transferee school corporation's total operating costs and the total capital costs for the class of school in which the student is enrolled by the ADM of students therein. Where a transferred student is enrolled in a transferee corporation for less than the full school year the transfer tuition shall be calculated by the proportion of such school year for which the transferred student is enrolled. A school year for this purpose shall consist of the number of days school is in session for pupil attendance. A student shall be enrolled in a transferee school, whether or not he is in attendance, unless his residence is outside the area of students transferred to the transferee corporation, or he has been excluded or expelled from school or has been confirmed as a school dropout. The transferor and transferee corporations may enter into written agreements concerning the amount of transfer tuition. Where an agreement cannot be reached the amount shall be determined by the superintendent of public instruction, with costs to be established, where in dispute, by the state board of accounts.

(f) The transferor corporation shall also pay the transferee corporation, when billed, the amount of book rental due from transferred students who are unable to pay the amount thereof. The transferor corporation shall be entitled to collect the amount of such book rental from the appropriate township trustee, from its own funds, or from any other source, in the amounts and manner provided by applicable law. [IC 1971, 20-8.1-6.5-3, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-4. State distributions and credits therefor.— (a) The state shall distribute to the transferee corporation for each calendar year at the times provided by law for state distribution to school corporations generally a portion of the state distribution due the transferor corporation allocable to the transferred students. This amount shall be the aggregate amount of state distributions for the transferor corporation per student in ADA or ADM provided by IC 1971, 21-3-1.5-3 in grades K-12 and from the state ADA flat distribution account, for students in grades 1-12, multiplied by the number of transferred students or portion thereof in grades K or 1-12, as applicable, in the school year ending in such calendar year. The amounts of such distributions shall be credited to transfer tuition payments due by the transferor corporation.

(b) Where a transfer is ordered to commence in a school year, where the transferor corporation has net additional costs over savings (on account of any transfer ordered) allocable to the calendar year in which the school year begins, and where the transferee* corporation has no budgeted funds for such net additional costs, they may be recovered by one or more of the following methods in addition to any other methods provided by applicable law.

(1) an emergency loan made pursuant to IC 1971, 20-5-4-6 to be paid, however, out of the debt service levy and fund, or a loan from any state fund made available therefor.

(2) an advance in such calendar year of state funds, which would otherwise become payable to the transferee* corporation after such calendar year pursuant to applicable law, and

(3) a grant or grants in such calendar year from any funds of the state made available therefor.

The net additional costs shall be certified by the state board of tax commissioners, and any grant shall be made solely after affirmative recommendation of the tax control board created by IC 1971, 6-1-67-4. Repayment of any advance or loan from

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* This is an apparent error in the statute as printed and should read "transferor".

the state shall be made in accordance with IC 1971, 6-1-67-4(e)(1)(cc). The use of any of the methods enumerated above shall not subject the transferor corporation to the provisions of IC 1971, 6-1-67-4(e)(2). [IC 1971, 20-8.1-6.5-4, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-5. Transfer tuition—Time of payment.—Transfer tuition for each school year shall be paid by the transferor corporation during the term of the year and following the end thereof in four [4] instalments within ten [10] days of the first day of November, February, May and August, respectively. The first three [3] payments shall be calculated on the basis of estimates based on the previous year's cost per student and the enrolment for the day schools are open in the transferee corporation next preceding the applicable payment date. [IC 1971, 20-8.1-6.5-5, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-6. Charging and crediting tuition payments to funds.—Payment of operating cost shall be paid from and receipted to the respective general funds of the transferor and transferee corporations. Payment of capital costs shall be made by the transferor corporation at its discretion from any fund or source and shall be receipted by the transferee corporation at its discretion either to the cumulative building fund or to the debt service fund. [IC 1971, 20-8.1-6.5-6, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-7. Transportation provided — Exception. — The transferor corporation shall provide each transferred student transportation to and from the school in the transferee corporation to which he is assigned but may require the transferred student to walk a reasonable distance from his home to school or to a transportation pick-up point. [IC 1971, 20-8.1-6.5-7, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-8. Transportation by transferor—Contracting with transferee authorized.—Transportation shall be provided by the transferor corporation to each transferred student in ac-

cordance with the provisions of IC 1971, 20-9.1 [20-9.1-1-1—20-9.1-7-4], except that the transferor corporation may contract with the transferee corporation to provide transportation to the transferred students (the transferor corporation paying the costs thereof) and that the transferor corporation, in addition to the other means of financing the purchase of transportation equipment, may make such purchases out of its cumulative building fund. [IC 1971, 20-8.1-6.5-8, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-9. Transportation costs—State reimbursement—Tax levy.—Transportation costs for transferred students for each calendar year or for capital outlay and for operations shall be reimbursed by the state to the transferor corporation in the same per cent of the total outlay which the distributions to the transferor corporation under IC 1971, 21-3-1.5-3, or from the state flat grant distribution account where it is credited to the general fund, constitute of its total annual general fund appropriations for such year. In this calculation there shall be excluded from general fund appropriations capital outlay, debt service, and any expenditure which is made out of the general fund from extracurricular accounts. Any amount not thus reimbursed and raised as part of the transferor corporation's general fund levy shall constitute an increase in its base tax levy for such budget year, as otherwise defined and as applied in IC 1971, 6-1-67 [6-1-67-1—6-1-67-8]. In no event shall the state reimbursement for transportation operating expense to the transferor corporation be less than it would receive under applicable law without regard to this section. [IC 1971, 20-8.1-6.5-9, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-10. Administration and enforcement of law—Rules and regulations—Disputes.—The provisions of this chapter [20-8.1-6.5-1—20-8.1-6.5-10] concerning the calculation of transfer tuition, the credits for state distribution, state reimbursement of transportation costs, or other state reimbursement may be implemented by regulation of the general commission of the

state board of education which shall also adopt rules for the enforcement of the payment of transfer tuition. Such enforcement may include, but is not limited to, the withholding of state support from the transferor corporation for the benefit of the transferee corporation. Any dispute in the amount of transfer tuition or state reimbursement shall be determined, upon application of either the transferor or the transferee corporation, by the state superintendent of public instruction. [IC 1971, 20-8.1-6.5-10, as added by Acts 1974, P. L. 94, § 1, p. 345.]

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-520

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,

Petitioners,

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants; UNITED STATES OF AMERICA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body; INDIANA STATE TEACHERS ASSOCIATION; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,

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DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants; UNITED STATES OF AMERICA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body; INDIANA STATE TEACHERS ASSOCIATION; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

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Respondents, Otis R. Bowen, as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of

the State of Indiana, Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana, and the Indiana State Board of Education, a public corporate body, (hereafter State Defendants) submit their brief in opposition to the Petition for Writ of Certiorari filed herein. This Petition is one of six cases[1] brought to this Court to review a decision issued by the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) on July 16, 1976, in cause numbers 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965 and 75-2007, which affirmed the Judgment of the United States District Court for Southern District of Indiana, Indianapolis Division (hereafter District Court) entered on August 1, 1975.

OPINIONS BELOW

The opinion of the Seventh Circuit issued on July 16, 1976, and the decision of the District Court entered on August 1, 1975, have not been officially reported, but may be found in Petitioners' Appendix A.

Other decisions by the District Court and the Seventh Circuit in the cause are 332 F. Supp. 655 (S.D. Ind., 1971), State Defendants Appendix in No. 76-515 p. A-118, (hereafter App. p. —), *aff'd.* 474 F. 2d 81 (7th Cir., 1973) (App. p. A-102), *cert. denied* 413 U.S. 920 (1973); 368 F. Supp. 1191 (S.D. Ind., 1973), (App. p. A-33), *aff'd.* 503 F. 2d 68 (7th Cir., 1974), (App. p. A-1), *cert. denied* 421 U.S. 929 (1975).

STATEMENT OF THE CASE

This Petition is an attempt to review an opinion issued by the Seventh Circuit on July 16, 1976, affirming, by

[1] Jurisdictional Statements were filed in Nos. 76-212, 76-458 and 76-468, and Petitions for Writs of Certiorari were filed in Nos. 76-515 and 76-522.

a divided Court, a decision of the District Court in a school desegregation case which ordered an interdistrict remedy to correct segregation previously found to exist only in the Indianapolis Public School system (hereafter I.P.S.). A complete statement of the case is set out in the State Defendants' Petition in No. 76-515.

Facts Material to Questions Presented

On August 18, 1971, the District Court issued its "Memorandum of Decision," 332 F. Supp. 655 (S.D. Ind., 1971) holding that I.P.S. was guilty of *de jure* segregation. The District Court's finding in that trial were that the I.P.S. school Board constructed three high school buildings in 1961, 1963, and 1967, the placement of which constituted acts of *de jure* segregation within I.P.S.

On July 20, 1973, the District Court issued its second major decision in this case, 368 F. Supp. 1191 (S.D. Ind., 1973). In that Decision the Court refound the acts of *de jure* segregation on the part of I.P.S., and held that those acts were "imputed" to the Indiana State Board of Education and the Superintendent of Public Instruction. The Court also found that none of the other school corporations involved in this case[2] were guilty of any acts of *de jure* segregation. 368 F. Supp. at 1208-1210. That finding has never been contested by any party, including Petitioner herein, in these entire proceedings.

---

[2] After issuance of the District Court's judgment on August 18, 1971, and the appeal thereof, the District Court allowed intervention by two children as alleged class representatives who named the remaining ten school corporations in Marion County, Indiana, and ten school corporations in the six counties surrounding Marion County, Indiana as added defendants.

REASONS FOR DISALLOWANCE OF THE WRIT

Petitioners acknowledge on page 26 of their Petition that they have not raised the question presented here in their appeal to the Seventh Circuit. Likewise, neither the United States nor the intervening Buckley Plaintiffs was an appellant in the Seventh Circuit, and therefore, did not raise these questions. Consequently, the attempted challenge herein of the District Court's remedy has never been briefed or argued to or decided by the Courts below.

Petitioners are thus taking a unique position in this Court in a lawsuit that was originally commenced against them by the United States on May 31, 1968. After the District Court found that Petitioners were guilty of *de jure* segregation within their own district, and after challenging that finding on appeal and then alleging, once the finding had been affirmed, that they could desegregate I.P.S. within that district, they now, in this Court and for the first time in eight and one half years of litigation, assert that the District Court should have ordered two way transfers of students instead of the one way transfer that they did not challenge, even though the other school corporations have been found not to have committed any acts of *de jure* segregation.

By this change of position the Petitioners are completely ignoring the legal deficiencies of the decisions by the District Court and the Seventh Circuit, and are attempting to raise new matters.

It is well settled that questions presented for review by this Court must properly arise in the record, *Tyrrell v. District of Columbia,* 243 U.S. 1 (1917), and must have been urged and briefed below, *California v. Taylor,* 353 U.S. 533 (1957); *Lawn v. United States,* 355 U.S. 339

(1958); *Neely v. Eby Construction Co.*, 386 U.S. 317 (1967). Thus, the writ prayed for herein must be denied.

Even if the question of two way transfers had been properly raised below, that type of remedy would be completely inappropriate in this case.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S.1 (1971), this Court clearly established the power of a district court in a school desegregation case, stating at page 16:

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that *judicial powers may be exercised only on the basis of a constitutional violation* ...
>
> ... As with any equity case, the nature of the violation determines the scope of the remedy ..."

This Court emphatically reaffirmed that principle in *Milliken v. Bradley*, 418 U.S. 717 (1974), stating at page 744:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation ... *Before the boundaries of separate and autonomous school districts may be set aside by* consolidating the separate units for remedial purposes or *by imposing a crossdistrict remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation ...*"

In the first trial of this cause the District Court found that I.P.S. was guilty of *de jure* segregation. The District Court reaffirmed that finding in the second trial, but expressly stated that none of the other separate and independent school districts involved therein was guilty of any *de jure* segregation. 368 F.Supp. at 1203. Thus, there was a violation in one school district, but no interdistrict violations, and *any* interdistrict remedy is therefore inappropriate whether it involves one way transfers or two way transfers.

CONCLUSION

For these reasons, the writ of certiorari prayed for should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-520

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,
Petitioner,

vs.

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND, RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS; ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION OF RESPONDENT THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA.

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IN THE

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OCTOBER TERM, 1976.

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THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,

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STATEMENT OF THE CASE.

Supplementing the statement of the case contained in the petition, petitioner The Board of School Commissioners of the City of Indianapolis, Indiana (sometimes referred to by the courts below and in the petition as "IPS"),. took an appeal from the judgment entered by the district court on August 1,

1975 (A47-A50), to the United States Court of Appeals for the Seventh Circuit, where it was docketed as No. 75-1765. The petitioner's brief, as an appellant in the court of appeals, stated the issues presented for review as follows:

> "1. Whether the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken* v. *Bradley* (1974), 418 U.S. 717, when:
>
> > "a. The only school system found to be *de jure* segregated is the Indianapolis Public School system governed by the Defendant, The Board of School Commissioners of the City of Indianapolis (hereinafter sometimes referred to as 'IPS');
> >
> > "b. The remaining school systems located within Marion County, Indiana, were expressly found by the Court not to be *de jure* segregated, which finding was affirmed by this Court of Appeals;
> >
> > "c. The basic rationale of the District Court in the imposition of an inter-district remedy is the Court's assumption that a desegregation plan for 'IPS' only, which is approximately 41% black, would be unconstitutional ('In the long haul it won't work.') even though the Supreme Court in *Milliken* v. *Bradley, supra,* has held that the Detroit system (with approximately 64% black student population) could be constitutionally desegregated, and
> >
> > "d. When a unitary school system within the meaning of the Fourteenth Amendment to the Constitution of the United States can be implemented (if not already accomplished) within the boundaries of 'IPS.'
>
> "2. Whether the District Court exceeded the limited remand of this Court." (Brief, pp. 1-3.)

As noted in the petition, this action was originally commenced by respondent United States of America against the petitioner. Following the decision of the district court on August 18, 1971

(332 F. Supp. 655), that petitioner's school system was unconstitutionally segregated, respondent United States, although it caused the respondent school corporations to be added as defendants, failed and refused to assert any claim against them seeking interdistrict relief. Thereupon, the district court allowed respondents Buckley to intervene and to assert such a claim. In its memorandum of decision dated August 1, 1975, the district court found, in connection with the right of respondents Buckley to recover a reasonable attorney's fee pursuant to 20 U. S. C. § 1617, as follows:

> "* * * It is the Court's opinion that the Buckley plaintiffs should be regarded as the 'prevailing parties,' within the meaning of such statute, if the rulings of this Court relating to transfer of pupils become final, since they are the only parties who have contended for a remedy going beyond the IPS strait jacket." (A46.)

Although respondent United States of America was adjudged by the district court not to be the prevailing party, it took no appeal from the judgment entered on August 1, 1975. (A47-A50) It appeared in the appeals taken by petitioner and the respondent school corporations as an appellee. Nevertheless, in its appellee's brief it argued that the remedy ordered by the district court was error, contending:

> "There are ample reasons why the district court's order requiring mandatory transfers of black I.P.S. students in order to achieve a 15% black ratio in eight of the 10 added defendant school districts cannot be squared with prevailing legal standards. Foremost among these is that such mandatory transfers across district lines are not related to the nature of nor necessary to correct any constitutional violations identified by the district court." (Page 28.)

Respondent United States asked the court of appeals to vacate the judgment of the district court and to remand the case to the district court for modifications in the judgment. In suggesting a proper disposition on remand, respondent United States argued

that "a provision permitting the voluntary transfers of black students residing within I. P. S. to the added defendant districts, in conjunction with the final desegregation of I. P. S. schools, would be in tune with the inter-district effects of racial discrimination found by the district court, and otherwise makes sense." (Brief, page 32) Respondent United States further argued that "such a provision would be completely consistent with Equal Education Opportunity Act of 1974." (Brief, page 33, note 43) The court of appeals rejected these arguments. (A24-A25)

ARGUMENT.

Petitioner's argument in the court of appeals for reversal of the judgment of the district court was to the effect that there was no constitutional violation that would warrant an interdistrict remedy under the authority of *Milliken* v. *Bradley*, 418 U. S. 717 (1974). Petitioner further argued that a unitary school system within the boundaries of IPS was workable, and that petitioner was ready, willing and able to implement a final desegregation plan within its own boundaries if permitted to do so by the district court. Petitioner neither presented nor argued in the court of appeals any of the issues embodied in the questions presented by its petition for writ of certiorari filed in this Court. It concedes this on page 26 in the conclusion of its petition.

In asking this Court to review the judgment of the court of appeals on writ of certiorari, petitioner no longer challenges the holding of the district court, affirmed by the court of appeals, that a constitutional violation calling for an interdistrict remedy occurred. As stated in footnote 14 on page 26 of the petition:

> "* * * The new board majority [of petitioner] favors some kind of interdistrict remedy involving IPS and other Marion County systems but opposes the particular remedy decreed by the District Court, for the reasons suggested herein. Accordingly, the arguments for reversal which IPS presented to the Court of Appeals are not pursued in this Court."

The petition for writ of certiorari presents no question for review, because it is well settled that, where issues are neither raised before nor considered by the court of appeals, the Supreme Court will not ordinarily consider them. *E.g., United States* v. *Ortiz,* 422 U. S. 891, 898 (1975); *Bivens* v. *Six Unknown Named Agents,* 403 U. S. 388, 397-98 (1971); *Adickes* v. *Kress & Co.,* 398 U. S. 144, 147, footnote 2 (1970). Moreover, when certiorari has been granted, the writ will be dismissed where it appears from the record that the questions have not been properly raised, litigated or passed upon below. *McCullough* v. *Kammerer Corporation,* 323 U. S. 327 (1945). And in determining whether an issue has been raised by a party in the court of appeals, the Supreme Court may examine the party's brief below. *United States* v. *Ortiz, supra.*

Petitioner contends that "issues concerning the nature and scope of the interdistrict remedy ordered and its disparate burden on black children, as well as the possible application of the Equal Educational Opportunities Act of 1974, were raised in the brief of the United States filed in [the court of appeals], although not discussed in the court's opinion." (Petition, p. 26) But respondent United States appeared in the court of appeals solely as an appellee. It filed no appeal. As an appellee, it was bound by the judgment of the district court and had no standing to be heard except in support of the judgment. *Helvering* v. *Pfeiffer,* 302 U. S. 247, 250-51 (1937); *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 185, 191-92 (1937). Consequently, the issues asserted by petitioner were not properly raised by respondent United States in the court of appeals and, in any event, were not passed upon by that court.

All of the issues properly raised, litigated and passed upon below are otherwise before this Court by appeals in Nos. 76-212, 76-458 and 76-468, and by petitions for writs of certiorari in Nos. 76-515 and 76-522.

CONCLUSION.

For the foregoing reasons, the petition of petitioner The Board of School Commissioners of the City of Indianapolis, Indiana, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 16, 1976, should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-520

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,
Petitioner,

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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REPLY BRIEF OF PETITIONER

The argument of Respondent Metropolitan School District of Perry Township ("Perry") and Respondents Bowen, Sendak, Negley and Indiana State Board of Education ("State") that the petition herein should be denied because Petitioner did not specifically argue in the Court of Appeals the precise questions presented in the petition, is unsound and inapplicable in the present case for the following reasons.

I. Specific limitations on the jurisdiction and powers of the federal courts may be noticed and raised at any time.

The proposition that limitations on the jurisdiction of the lower courts to consider and decide the merits of the issues presented to them may be raised and will be passed upon by the Supreme Court, even if such questions were not presented to or passed upon by the lower courts, is well established in the jurisprudence of this Court. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *Gutierrez v. Waterman S. S. Corp.*, 373 U.S. 206, 209 (1963). Application of this rule is not limited to cases where the trial court lacked jurisdiction over the subject matter. For example, in *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945), this Court ordered dismissal of a suit for refund of state taxes alleged to have been exacted in violation of the Commerce Clause. The Court held that the state statute providing for refund suits gave consent to suit only in the state courts and did not constitute a waiver of Eleventh Amendment immunity, although such question was raised by the state for the first time in this Court. In *McGrath v. Kristensen*, 340 U.S. 162, 167 (1950), the issue of justiciability under Article III of the Constitution was considered and passed upon for the first time in this Court. And in *Neely v. Eby Construction Co.*, 386 U.S. 317, 320-321 (1967), a case relied on by the State, this Court granted certiorari to consider whether the Court of Appeals had the authority, under Rule 50(d) of the Federal Rules of Civil Procedure, to order a complaint dismissed upon its determination that a jury verdict for plaintiff should have been set aside for insufficiency of the evidence, although the petitioner had argued in the Court of Appeals only that the evidence was sufficient to support the verdict and had not filed a petition for rehearing.

The Equal Educational Opportunities Act of 1974 in 20 U.S.C. § 1713, § 1755 and § 1758 limits the jurisdiction and powers of a federal court in entering a remedial decree after a finding of *de jure* segregation in schools by requiring certain findings with respect to alternative remedies, as well as deferral to local school officials and community leaders for a reasonable opportunity to develop a remedial plan, before the Court is permitted to enter a decree requiring involuntary transportation of students. In the present case the District Court ignored these limitations on its powers and jurisdiction, as well as the consistent holdings of this Court in school desegregation cases that the first responsibility to provide a remedy for unlawful school desegregation rests upon local school officials. *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 299 (1955).

In *Mahler v. Eby*, 264 U.S. 32 (1924), the Court emphasized that such a statutory requirement that certain findings be made or procedures followed as a precondition to a challenged action is a jurisdictional limitation which will be considered for the first time in the Supreme Court. The Court granted habeas corpus to aliens ordered deported because the deportation warrant failed to include a specific finding that the petitioners were "undesirable residents" as required by statute, although the petitioners had been convicted of certain crimes which could have been a ground for such a finding. Since such finding was "made a condition precedent to deportation by the statute," 264 U.S. at 44, this Court rejected the contention that the issue was not properly raised below (*Id.* at 45):

> "... The character of the defect is such that we cannot relieve ourselves from its consideration. The warrant lacks the finding required by the statute, and such a fundamental defect we should notice. It goes to the existence of the power on which the proceeding rests. It is suggested that if the objection had been made

> earlier, it might have been quickly remedied. There was no chance for objection afforded the petitioners until after the warrant issued, in the petition for habeas corpus. The defect may still be remedied on the objection made in this court."

Mahler involved adjudicative action by an administrative agency but, as the *Ford Motor Co.* and *McGrath* cases make clear, the same principle applies to limitations on the judicial powers of the federal courts.

II. This is an exceptional case where justice requires consideration of the issues presented in the petition.

The cases cited by Perry and the State make clear that this Court is not prohibited from considering issues not specifically argued or passed upon below. As stated in *Adickes v. Kress and Co.*, 398 U.S. 144, 147, n. 2 (1970), "where issues are neither raised before nor considered by the Court of Appeals this Court will not *ordinarily* consider them" (emphasis added). In *Adickes* the issue whether petitioner should have been allowed to amend her complaint in the District Court had little significance in view of this Court's holding that the lower courts applied improper standards of proof under the basic complaint, requiring remand for a new trial. And in *Lawn v. United States*, 355 U.S. 339, 362-363, n. 16 (1958), cited in *Adickes* and relied on by the State, the issue whether the trial court properly refused a motion during trial for production of statements was raised neither in the Court of Appeals nor in the certiorari petition. By contrast, in the present case the issues upon which Petitioner seeks review are vital questions which substantially affect the ability of Petitioner to provide the best possible educational program for its 80,000 students, which go to the essence of the decree

and which relate to the authority of a federal court to alter drastically the administration of local school systems. The case is thus more analogous to *Brotherhood of Carpenters v. United States,* 330 U.S. 395, 412 (1946), where this Court found that exceptional circumstances warranted notice of an erroneous jury charge which "was on a vital phase of the case and affected the substantial rights of the defendants." As the Court there pointed out, and as specifically provided under Rule 40(1)(d)(2), it may properly "notice a 'plain error' though it is not assigned or specified." To the same effect are *United States v. Atkinson,* 297 U.S. 157, 160 (1936) and *Washington v. Davis,* 48 L.Ed.2d 597, 606 (1976).

The Court has also held that although not passed upon by the Court of Appeals, issues raised for the first time in this Court on questions of law not calling for the examination or appraisal of evidence will be considered. *Kiefer-Stewart Company v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 214 (1951). The issues raised by Petitioner here do not challenge factual determinations below.

The errors relied on by Petitioner are fundamental and important public issues which this Court should not leave undetermined. Moreover, justice requires that the Court consider changes in facts which have supervened since the decree was entered below. *Watts, Watts & Company v. Unione Austriaca Di Navigazione,* 248 U.S. 9, 22 (1918). In the *Watts* case the Court noted that the relation of the parties to the Court had changed radically. That is also the case here. These questions are presented here by a newly constituted school board which had no prior opportunity to be heard in the District Court or Court of Appeals. See also *Ashcraft v. Tennessee,* 322 U.S. 143, 156 (1943).

III. The question of the propriety of the remedy ordered was argued in and considered by the Court of Appeals.

Petitioner has appealed each order of the District Court in this case and has urged the Court of Appeals to reverse such orders, including the present order of August 1, 1975. Of course, the issues regarding applicability of the 1974 statutory limitations on the powers of the court and the propriety of the entry of a decree without affording the affected school authorities a prior opportunity to submit plans, did not arise in this case until the District Court's judgment of August 1, 1975.

The United States urged in the Court of Appeals that the remedy ordered by the District Court went beyond its proper scope, given the facts found and the nature of the interdistrict violation. Whether, as Perry argues, the Court of Appeals could properly have disregarded such arguments on the ground that the United States was an appellee, that Court nevertheless considered the merits of the Government's contentions in its decision (Pet. A24-A25). Petitioner is likewise questioning the scope of the remedy here, on grounds similar to those urged by the United States.[1] Since the propriety of the remedy ordered was considered by the lower court, its review by this Court on the grounds urged by Petitioner presents no problem of unfairness or surprise either to the Court of Appeals or the parties.

---

[1] The State's misrepresentation that Petitioner here "assert[s] that the District Court should have ordered two way transfers of students instead of the one way transfer that they did not challenge" (Brief in Opposition at p. 4) can hardly be inadvertent. Petitioner did challenge the one way transfer order in the Court of Appeals, and its petition here clearly states that it seeks full exploration of less drastic alternative remedies before such a large number of involuntary student transfers is required. Petition at 16 (n. 7), 24 (n. 13).

CONCLUSION

For the reasons stated, the arguments of Respondents that the questions presented in this petition are not open to consideration by this Court are without merit, and this Court should grant the petition upon such issues.

Respectfully submitted,

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